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## People With Secrets: Contesting, Constructing, and Resisting Women's Claims About Sexualized Victimization

Rose Corrigan

Corey S. Shdaimah

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## People With Secrets: Contesting, Constructing, and Resisting Women's Claims About Sexualized Victimization

### Cover Page Footnote

Associate Professor of Law and Politics, Drexel University; Associate Professor, University of Maryland School of Social Work. We are deeply indebted to colleagues who provided helpful feedback about this project, including Anne Dalke, Daniel Filler, Annie Hill, and Judith L.M. McCoyd. We are grateful for the opportunity to have presented a very early draft of this project at the Feminist Legal Theory Pre-Conference in conjunction with the annual American Association of Law Schools conference in January 2012 to an enthusiastic and supportive audience, especially our reader, Deborah Eisenberg. We deeply appreciate the work of graphic designer Melissa Orner, who helped conceptualize and design the Arena of Intelligibility. The authors benefited from the intellectual contributions of our colleagues for ongoing, illuminating conversations regarding these issues. Rose Corrigan particularly wishes to thank Lesley McMillan, Sameena Mulla, Geth Rees, and Deborah White; Corey Shdaimah acknowledges the contributions of Chrysanthi Leon, Shelly Wiechelt, Katie Hail-Jares, and Marie Bailey-Kloch.

# PEOPLE WITH SECRETS: CONTESTING, CONSTRUCTING, AND RESISTING WOMEN'S CLAIMS ABOUT SEXUALIZED VICTIMIZATION

*Rose Corrigan & Corey S. Shdaimah*<sup>+</sup>

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Notwithstanding harsh critiques by criminal law and feminist scholars, sometimes the legal system *does* work. Consider, for example, Linda, an African American woman with a criminal record for prostitution. Linda reported that she was arrested on a prostitution charge by a police officer who had coerced her into sex. Given that very few sexual assault allegations progress from reporting to investigation to prosecution, scholars who study sexual assault would predict that Linda's allegations would have little traction among criminal

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justice personnel.<sup>1</sup> Linda's story appears to lack many of the elements scholars suggest are likely to make a sexual assault case successful: there was no use of physical violence or a weapon; she is African American; and her assailant has a higher status than her own.<sup>2</sup> Critically and unavoidably, Linda was known to have engaged in a form of street-level prostitution that is highly stigmatized and unlikely to garner sympathy.<sup>3</sup> Scholars who study criminal justice attitudes toward sex workers could predict that Linda's report would fall on deaf ears, and that she was (at best) unlikely to be viewed as a legitimate victim whose case deserves the investment of state resources and recognition.<sup>4</sup>

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1. See ROSE CORRIGAN, UP AGAINST A WALL: RAPE REFORM AND THE FAILURE OF SUCCESS 3–5 (2013) (discussing the general lack of support proffered to victims of sexual assault based on several factors including socioeconomic status, faulty perceptions of credibility, and the overall difficulty of making a case); Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 94–97, 113–18 (2002) (exploring the biases involved at the initial police investigation and the actual trial when assessing the “validity” of a sexual assault); Megan Alderden & Sarah Ullman, *Creating a More Complete and Current Picture: Examining Police and Prosecutor Decision-Making when Processing Sexual Assault Cases*, 18 VIOLENCE AGAINST WOMEN 525, 527, 539 (2012) (noting that initial perceptions by police officers of a victim's truthfulness can steer the decision of whether to investigate and prosecute a case); I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 849–71 (2013) (discussing how rape shield laws benefit “ideal women,” but harm women who do not appear as a quintessential rape victim); Deborah Tuerkheimer, *Judging Sex*, 97 CORNELL L. REV. 1461, 1477 (2012) (addressing the culture of rape shield law and the perception of consent, which give rise to the general “presumption of unrapeability”). Empirical studies have produced evidence showing the limited impact of rape law reforms in addressing “non-stereotypical” sexual offenses. Ronet Bachman & Raymond Paternoster, *A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?*, 84 J. CRIM. L. & CRIMINOLOGY 554, 568–73 (1993). See generally MARTIN D. SCHWARTZ, POLICE INVESTIGATION OF RAPE—ROADBLOCKS AND SOLUTIONS 34–35, 46–47 (2010), <https://www.ncjrs.gov/pdffiles1/nij/grants/232667.pdf> (describing negative police attitudes toward sexual assault allegations by women involved in prostitution).

2. CASSIA SPOHN & JULIE HORNEY, RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT 113–16 (1992); see Alderden & Ullman, *supra* note 1, at 528–29; David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1238–40, 1274–75 (1997).

3. See Jody Miller & Martin D. Schwartz, *Rape Myths and Violence Against Street Prostitutes*, 16 DEVIANT BEHAV. 1, 1–23 (1995); Ronald Weitzer, *Sociology of Sex Work*, 35 ANN. REV. SOC. 213, 218 (2009) (explaining that “street prostitution” is the type of sex work in which women are most vulnerable to harm); cf. Kimberly D. Krawiec, *A Woman's Worth*, 88 N.C. L. REV. 1739, 1745 (2010).

4. See Vivian B. Lord & Gary Rassel, *Law Enforcement's Response to Sexual Assault: A Comparative Study of Nine Counties in North Carolina*, in SEXUAL VIOLENCE: POLICIES, PRACTICES, AND CHALLENGES IN THE UNITED STATES AND CANADA 155, 165 (James Hodgson & Debra Kelley eds., 2002); Beverly Balos & Mary Louise Fellows, *A Matter of Prostitution: Becoming Respectable*, 74 N.Y.U. L. REV. 1220, 1261 (1999); Lisa Frohmann, *Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking*, 31 LAW & SOC'Y REV. 531, 548–49 (1997) [hereinafter Frohmann, *Convictability and Discordant Locales*]; Lisa Frohmann, *Discrediting Victims' Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections*, 38 SOC. PROBS. 213, 223 (1991) [hereinafter Frohmann, *Discrediting Victims*] (describing tactics used by police in investigations concerning

But that is not what happened. Rather than brushing aside Linda's allegations, a social worker and prosecutor met with Linda to determine possible courses of action. Powerful criminal justice actors, eager and interested to advocate on her behalf, took Linda's allegations seriously. How, then, can we explain this puzzling outcome?

It is well established that not all women claiming victim status are equal in the eyes of legal actors.<sup>5</sup> Researchers have long contended that variation in how women affected by sexual offenses are treated reflects the importance placed on the complainant's sociodemographic characteristics (such as race, age, or relationship to the assailant) and moral qualities (including whether she was engaged in non-gender normative behavior at the time of the offense, used drugs/alcohol, or had previous arrests).<sup>6</sup> Nils Christie neatly encapsulated the importance of such elements in his development of the "ideal victim," a concept which has been widely adopted across disciplines that examine criminal justice proceedings.<sup>7</sup> Christie describes the ideal victim as a person who is weak compared to the offender, is engaged in morally virtuous and/or ordinary everyday behavior at the time of the crime, is blameless for the criminal conduct, and is harmed by an assailant who is easily perceived as unambiguously "big and bad."<sup>8</sup> Scholars contend that differences in women's treatment by legal actors and disparities in criminal case outcomes often reflect beliefs about which women are recognized as ideal victims.<sup>9</sup>

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sexual assault victims, who are considered "suspicious" because of their race and socioeconomic status); Karin S. Portlock, *Status on Trial: The Racial Ramifications of Admitting Prostitution Evidence under State Rape Shield Legislation*, 107 COLUM. L. REV. 1404, 1404–07 (2007) (noting that some jurisdictions admit evidence of prostitution to impeach a victim's credibility or support potential consent).

5. PATRICIA YANCEY MARTIN, RAPE WORK: VICTIMS, GENDER, AND EMOTIONS IN ORGANIZATION AND COMMUNITY CONTEXT 71–72 (2005); Elizabeth Anne Stanko, *Would you Believe this Woman? Prosecutorial Screening for "Credible" Witnesses and a Problem of Justice*, in JUDGE, LAWYER, VICTIM, THIEF 63, 67–68 (Nicole Hahn Rafter & Elizabeth Stanko eds., 1982) [hereinafter Stanko, *Would you Believe this Woman?*]; Wayne A. Kerstetter, *Gateway to Justice: Police and Prosecutorial Response to Sexual Assaults Against Women*, 81 J. CRIM. L. & CRIMINOLOGY 267, 271–74 (1990) (presenting findings that victim and assault characteristics influence the exercises of discretion, such as whether to investigate or file charges); Patricia Yancey Martin & R. Marlene Powell, *Accounting for the "Second Assault": Legal Organizations' Framing of Rape Victims*, 19 LAW & SOC. INQUIRY 853, 872–73 (1994).

6. DAN MARKEL, JENNIFER M. COLLINS & ETHAN J. LEIB, PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES 27 (2009); Alderden & Ullman, *supra* note 1, at 528–29; Janice Du Mont & Terri L. Myhr, *So Few Convictions: The Role of Client-Related Characteristics in the Legal Processing of Sexual Assaults*, 6 VIOLENCE AGAINST WOMEN 1109, 1112–14, 1126 (2000); Frohmann, *Discrediting Victims*, *supra* note 4, at 223.

7. Nils Christie, *The Ideal Victim*, in FROM CRIME POLICY TO VICTIM POLICY: REORIENTING THE JUSTICE SYSTEM 17, 18 (Ezzat A. Fattah ed., 1986).

8. *Id.* at 19.

9. See Alderden & Ullman, *supra* note 1, at 528–29; Bryden & Lengnick, *supra* note 2, at 1202, 1238–41; Cassia Spohn, Clair White & Katharine Tellis, *Unfounding Sexual Assault: Examining the Decision to Unfound and Identifying False Reports*, 48 LAW & SOC'Y REV. 161,

Such theories, supported by extensive quantitative research on sex crime case adjudication, have long challenged the idea that changes in black letter law have eliminated differential treatment of women by criminal justice officials.<sup>10</sup> These studies show that complainant characteristics (particularly whether complainants can be understood as ideal victims) can play an important role in explaining variation in criminal case outcomes.<sup>11</sup> Such work has contributed enormously to our understanding of how victim- and case-related variables influence general decision-making patterns.

Yet the explanatory power of large-scale quantitative studies is limited; despite creative efforts to further conceptualize and isolate variables that contribute to case outcomes, researchers have not been able to fully account for the continued variation in how sex crimes cases proceed through criminal justice systems.<sup>12</sup> The current models cannot predict or explain why Linda was taken

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166–68 (2014). Regarding prostitution, FBI crime statistics indicate that women (Table 42) and racial minorities (Table 49) are disproportionately arrested for prostitution. U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 2009 (2010), [https://www2.fbi.gov/ucr/cius2009/data/table\\_42.html](https://www2.fbi.gov/ucr/cius2009/data/table_42.html); U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 2009 (2010), [https://www2.fbi.gov/ucr/cius2009/data/table\\_49.html](https://www2.fbi.gov/ucr/cius2009/data/table_49.html). Lest the argument for gender disparities be explained by the assertion that women are the primary sellers of sex, the definition for prostitution includes not only the sale of sex, as these statistics are reported under the category of “[p]rostitution and commercialized vice,” but the definition also includes:

[t]he unlawful promotion of or participation in sexual activities for profit, including attempts . . . [t]o solicit customers or transport persons for prostitution purposes; to own, manage, or operate a dwelling or other establishment for the purpose of providing a place where prostitution is performed; or to otherwise assist or promote prostitution.

U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 2009 (2010), [https://www2.fbi.gov/ucr/cius2009/about/offense\\_definitions.html](https://www2.fbi.gov/ucr/cius2009/about/offense_definitions.html); see also Stacie Reimer Smith & Antonio Villaamil, *Prostitution and Sex Work*, 13 GEO. J. GENDER & L. 333, 334 n.4, 341 (2012).

10. See Alderden & Ullman, *supra* note 1, at 528–29; Bachman & Paternoster, *supra* note 1, at 556, 573; Bryden & Lengnick, *supra* note 2, at 1199; Du Mont & Myhr, *supra* note 6, at 1131–32; Kerstetter, *supra* note 5, at 273–75; see also Elizabeth M. Johnson, *Buyers Without Remorse: Ending The Discriminatory Enforcement Of Prostitution Laws*, 92 TEX. L. REV. 717, 725–27 (2014); Minouche Kandel, *Whores in Court: Judicial Processing of Prostitutes in the Boston Municipal Court in 1990*, 4 YALE J.L. & FEMINISM 329, 333–35 (1992); Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2171 (1995).

11. See Alderden & Ullman, *supra* note 1, at 528–29; Du Mont & Myhr, *supra* note 6, at 1131–32; Johnson, *supra* note 10, at 725–27; Kandel, *supra* note 10, at 333–35; Kerstetter, *supra* note 5, at 273–75; Schulhofer, *supra* note 10, at 2171.

12. Dawn Beichner & Cassia Spohn, *Prosecutorial Charging Decisions in Sexual Assault Cases: Examining the Impact of a Specialized Prosecution Unit*, 16 CRIM. JUST. POL’Y REV. 461, 490–91 (2005) (noting that victim credibility is a “focal concern” of prosecutors, which transcends differences in office organization, policies, and procedures); Yingyu Chen & Sarah E. Ullman, *Women’s Reporting of Sexual and Physical Assaults to Police in the National Violence Against Women Survey*, 16 VIOLENCE AGAINST WOMEN 262, 271 (2010) (noting that sexual assaults were more likely to be reported to police when they include stereotypical elements of forcible rape, such as attacks committed by strangers, perceived as a threat to the victim’s life, involving a weapon, or resulting in injury to the victim); David Holleran, Dawn Beichner & Cassia Spohn, *Examining*

seriously. Certainly, none of the sophisticated statistical models developed to explain sex offenses would account for the seriousness with which her report was viewed, given the routine dismissal of cases without such “complicating” characteristics.<sup>13</sup> Nor does top-down theory seem fully capable of cataloguing, explaining, and intervening in such practices of differentiation.<sup>14</sup> Realists familiar with law enforcement responses to sexual offenses often see decisions to investigate and charge cases as outliers to be explained, rather than obvious outcomes of an effective and fair criminal justice system.<sup>15</sup>

Although the concept of the ideal victim is a powerful tool to explain some variability in criminal case processing, we believe that additional theoretical tools—derived from empirical research and responsive to the complex realities and sometimes conflicting criminal justice priorities—are required to explain the full range of responses by criminal justice actors to women affected by sexual crimes.

By contrasting two groups of women affected by sexual offenses—those reporting a sexual assault and those charged with prostitution—we show that ideal victim theory is insufficient to explain the range of law enforcement responses to women associated with sexual transgressions. We remedy the deficiencies of ideal victim theory by proposing the Arena of Intelligibility (hereinafter “the Arena”) to capture the dynamic, relational processes that shape how women are identified and categorized by legal actors.<sup>16</sup>

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*Charging Agreement Between Police and Prosecutors in Rape Cases*, 56 CRIME & DELINQ. 385, 386, 408 (2010) [hereinafter Holleran, Beichner & Spohn, *Examining Charging Agreement*]; Sharon B. Murphy et al., *Police Reporting Practices for Sexual Assault Cases in Which “The Victim Does Not Wish to Pursue Charges”*, 29 J. INTERPERSONAL VIOLENCE 144, 145–46 (2014).

13. See Christie, *supra* note 7, at 21.

14. As Professor Stephen Schulhofer proposed:

We need theory to help pinpoint the problems confronting women and to help organize thinking about solutions . . . I suggest the need for a rather skeptical attitude toward high theory in the search for a feminism that can guide reform in criminal justice and, perhaps, other areas. Despite the undoubted importance of theoretical insight, the most effective tools of reform at the present juncture are likely to be eclectic and atheoretical, and the most effective feminist scholarship is likely to be one that attends to the complexities of specific institutions and procedures. What is needed, I suggest, is a feminism of particulars, a recognition that real solutions are likely to lie deeply embedded in the details.

Schulhofer, *supra* note 10, at 2152–54. Although we agree with Professor Schulhofer that high theory alone is not capable of solving these problems, we believe that theoretical tools drawn from empirical research, such as those we offer in this article, can provide important leverage on persistent problems in criminal justice systems.

15. Lisa Frohmann, *Hard Cases: Prosecutorial Accounts for Filing Unconvictable Sexual Assault Complaints*, 9 CURRENT RES. OCCUPATIONS & PROFS. 189, 190 [hereinafter Frohmann, *Hard Cases*]; Wayne A. Kerstetter & Barrick Van Winkle, *Who Decides?: A Study of the Complainant’s Decision to Prosecute in Rape Cases*, 17 CRIM. JUST. & BEHAV. 268, 270–72 (1990).

16. Here we follow the lead of scholars who study sexual assault case outcomes and have noted pointedly that “most of the factors that significantly predicted whether cases were founded,

Our case studies show that decisions about whether and when to invest resources in cases of sexual exploitation rely less on the static qualities that characterize ideal victims than on dynamic factors, such as behaviors and interactions between law enforcement officials and women involved with sexual crimes.<sup>17</sup> The Arena that we develop here is informed by the assumption that, as a probation officer in Shdaimah's study said about women in prostitution, "these are people with secrets."<sup>18</sup> Women in prostitution are assumed to be keeping secrets about the trauma, abuse, and addiction that drove them, unwillingly, into prostitution.<sup>19</sup> Shdaimah finds that women involved with court-affiliated prostitution diversion programs are encouraged to tell their stories, offer compelling explanations for their behavior, and emerge as full and complex human beings.<sup>20</sup> Law enforcement officials believe rape victims are hiding secrets as well, but these secrets are assumed to be their own illegal or immoral acts and the false reports they make to mislead police and family members about such acts.<sup>21</sup> Thus, Corrigan finds that women who report sexual assault are interrogated, dehumanized, and delegitimized.<sup>22</sup>

The shared assumption that women affected by sexual crimes have something to hide—that they are "people with secrets"—leads to very different kinds of investigatory and surveillance strategies.<sup>23</sup> These strategies encourage (and, sometimes, demand) that these women yield their secrets in order to be found deserving of legal resources, recognition, and protection.<sup>24</sup> Criminal justice personnel appear to believe that the sexual aspect of the crimes in which both these groups of women are enmeshed authorizes more searching questions, more intrusive demands for the yielding of bodies and narratives to official scrutiny, and performances consistent with expectations about victimization and trauma.

In comparing these two different groups of women involved with criminal justice institutions, we show how claims about victimization and concomitant demands on state resources are negotiated and contested by legal officials and women affected by sex offenses.<sup>25</sup> The Arena is a valuable analytic tool for exploring how legal actors and institutions decide which women claiming victim

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resulted in arrest, were presented to the prosecution, or resulted in felony charges were extralegal in nature. In other words, factors that mattered most were those that should not matter when determining if a crime occurred." Alderden & Ullman, *supra* note 1, at 541.

17. See *infra* Part III.

18. Interview with Jan, Project Dawn Court Personnel (Shdaimah), Phila., Pa. (Nov. 3, 2011).

19. See Bryan N.H. Jacobson, *Addressing the Tension Between the Dual Identities of the American Prostitute: Criminal and Victim; How Problem-Solving Courts Can Help*, 37 SEATTLE U. L. REV. 1023, 1026, 1029, 1049 (2014).

20. See *infra* notes 149–50 and accompanying text.

21. See *infra* notes 136–38 and accompanying text.

22. See *infra* notes 138–40 and accompanying text.

23. See *infra* notes 148–50 and accompanying text.

24. See *infra* notes 148–50 and accompanying text.

25. See generally Alderden & Ullman, *supra* note 1, at 543 (noting that officers are generally more willing to investigate a case based on their own perceptions of who constitutes a victim).



status deserve legal resources and protection. The Arena thus highlights new areas for empirical investigations of criminal justice processes and points to previously unidentified targets for policy reform.

The juxtaposition of these two groups of women may be jarring, but we believe the contrast is powerful and illuminating. In comparing them we do not claim that all women engaged in prostitution are victims of sexual assault, nor that all victims of sexual assault have engaged in prostitution. Importantly, we do *not* in any way suggest that the language of “involvement with” or being “affected by” a sex offense as a victim/witness of that crime means that victims of sexual violence have consented to or are to blame for sexual conduct. Rather, the purpose of comparing these two different groups and using ostensibly “neutral” language is to reveal how legal actors make decisions regarding what state resources and recognition to confer upon women claiming victim status, if any at all.

Although both groups are identified by their association with sexual offenses, they occupy very different positions in the criminal justice system. Women who report sexual violence are assumed to be sympathetic victims of an abhorrent form of assault.<sup>26</sup> Public statements from politicians and criminal justice officials describe rape victims as deserving state resources, community support, and redress.<sup>27</sup> Criminal justice officials often pledge unconditional support for victims and disavow any acceptance of rape myths or reliance on ideal victim heuristics.<sup>28</sup> In contrast, women involved in prostitution have long been depicted as law-breakers whose behavior is offensive to individuals and communities, a harbinger of deeper and more dangerous forms of criminality.<sup>29</sup> Whether conceptualized as a nuisance crime that erodes property values or as evidence of a more serious disorder, women engaged in prostitution are routinely

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26. See, e.g., Bryden & Lengnick, *supra* note 2, at 1202.

27. See, e.g., *The Implementation of the Violence Against Women Act Provisions of the Violent Crime Control and Law Enforcement Act, (1994): Hearing on P.L. 103-322 Before the S. Comm. on the Judiciary*, 103rd Cong. 2–3 (1994) (statement of Sen. Joseph R. Biden, Jr., Chairman, S. Comm. on the Judiciary).

28. After interviewing detectives who investigate sexual assault cases, Schwartz writes that: [P]olice were quick to say all of the right things, including and especially the fact that all cases were investigated dispassionately by the detectives, written up objectively, and passed on without prejudice. Yet, when the microphone was off again and again (or even while the microphone was on) these detectives admitted that there were a large number of cases where they “unfounded” the case rather than continue with it.

SCHWARTZ, *supra* note 1, at 43. For discussions of police acceptance of rape myths and attitudes toward sexual assault, see Amy Dellinger Page, *True Colors: Police Officers and Rape Myth Acceptance*, 5 FEMINIST CRIMINOLOGY 315, 325–27 (2010) [hereinafter Page, *True Colors*]; Amy Dellinger Page, *Behind the Blue Line: Investigating Police Officers' Attitudes Toward Rape*, 22 J. POLICE & CRIM. PSYCHOL. 22, 24–26 (2007) [hereinafter Page, *Behind the Blue Line*].

29. See Peter C. Hennigan, *Property War: Prostitution, Red-Light Districts, and the Transformation of Public Nuisance Law in the Progressive Era*, 16 YALE J.L. & HUMAN. 123, 153–54 (2004) (discussing societal attitudes regarding red-light districts and the concept of the “fallen woman” as a cautionary tale warning against “immoral” behavior).

vilified and criminalized.<sup>30</sup> In public discourse, then, individuals who report sexual violence are typically portrayed as ideal victims deserving protection and redress, while prostitute women are identified as offenders deserving prosecution and punishment.<sup>31</sup> Yet such beliefs are incongruent with the outcomes we observe through our empirical research on how criminal justice officials respond to women affected by rape and prostitution.

In Part I of this Article, we first describe how scholars use primarily quantifiable, demographic variables as predictors or explanations of case outcomes. Such scholarship has built theory about which categories of people are ideal victims, i.e., those that are most likely to be seen as deserving of state resources and recognition. This section ends with our proposal of the Arena of Intelligibility as a tool to enrich the two-dimensional framework of ideal victim theory. In Part II, we outline our respective study methods, explaining why qualitative data are necessary to investigate the process by which legal actors make decisions on the ground. In Part III, we present our original findings and analyses from two studies: one examining the case trajectories of sexual assault victims and the other examining the case trajectories of women participating in court-affiliated prostitution diversion programs. This Part looks at three components of intelligibility: how women respond to questions, demonstrate compliance, and represent trauma. We show why and how this process of “making sense” matters within the legal system and beyond. Part IV concludes with a discussion of implications for research, policymaking, and practice.

#### I. HOW CRIMINAL JUSTICE PERSONNEL RECOGNIZE VICTIMS

Nils Christie describes the ideal victim as “a person or a category of individuals who—when hit by crime—most readily are given the complete and legitimate status of victim.”<sup>32</sup> It is a useful shorthand to capture the dominant scholarly emphasis on quantifiable sociodemographic factors, which are assumed to predict case outcomes. In Subsection A, we demonstrate that the use of such factors is enormously helpful in identifying patterns of bias and discrimination in criminal justice case processing and outcomes. However, such approaches ignore important interactive and dynamic variables, relationships, and processes that shape outcomes. In Subsection B, we introduce the Arena of Intelligibility as an intellectual tool to remedy this lacuna.

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30. See, e.g., Johnson, *supra* note 10, at 747.

31. See generally Cassia Spohn & Katharine Tellis, *The Criminal Justice System's Response to Sexual Violence*, 18 VIOLENCE AGAINST WOMEN 169, 173, 180 (2012).

32. Christie, *supra* note 7, at 18.

### A. Ideal Victim Theory and Case Outcomes

#### 1. The Power of Ideal Victim Theory

Christie's formulation portrays an ideal victim who is weak compared to the offender; engaged in morally virtuous and/or ordinary, everyday behavior; blameless for the criminal conduct; unknown to the assailant; harmed by someone who can be understood as unambiguously "big and bad"; and not threatening to powerful countervailing interests.<sup>33</sup> For Christie, victimization is a status that is simultaneously individualized and, often as both cause and result, highly politicized; the image of the ideal victim abstracts the experience of victimization from a broader social context, privileging some claimants and forms of victimization while excluding others.<sup>34</sup> Christie points out that ideal victims often do not reflect typical victims, and argues that the focus on ideal victims obscures the social construction of crime and alternative causes of and responses to crime.<sup>35</sup>

Scholars who study gender-based violence often invoke the concept of the ideal victim, whether or not they do so explicitly. The qualities associated with what Christie identifies as the ideal victim crystallize and recapitulate arguments feminist activists and researchers have been making since the 1970s: that the legitimacy of women's legal claims to victimization—especially, but not only in crimes involving sexual conduct—are largely determined by stereotypes about victims, offenders, and crimes.<sup>36</sup> As the next section shows, over the last forty years, considerable energy has been devoted to studies that explore how legal handling of women affected by sexual crimes is influenced by characteristics of the victim, the offender, and the crime, as well as the personal attitudes and institutional priorities of criminal justice system personnel.<sup>37</sup> Ideal victim theory, therefore, provides a useful shorthand by which to refer to models that emphasize these characteristics as the variables that most influence legal responses to sexual crimes.

#### 2. The Limitations of Ideal Victim Theory

Approaches that invoke ideal victim theory leave unquestioned basic assumptions that ideal victims are easily identified based on a set of static characteristics. Furthermore, both scholars and law enforcement officials argue that once in the criminal justice system, ideal victims are easily recognized as

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33. *Id.* at 19.

34. *Id.* at 21.

35. *Id.* at 27.

36. See SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* 176 (1975) (describing the typical perpetrator of sexual assault as "an aggressive, hostile youth who chooses to do violence to women"); SUSAN ESTRICH, *REAL RAPE* 101 (1987); Martha Burt, *Cultural Myths and Supports for Rape*, 38 *J. PERSONALITY & SOC. PSYCHOL.* 217, 217 (1980) (addressing the "rape myth" that female victims "ask for it" and typical perpetrators are "sex-starved").

37. See Page, *True Colors*, *supra* note 28, at 328–39.

such, allowing them to benefit from the full resources of that system.<sup>38</sup> Christie cautions against such an approach, saying that “being a victim is not a thing, an objective phenomenon. It will not be the same to all people in situations externally described as being the ‘same.’ *It has to do with the participants [sic] definition of the situation.*”<sup>39</sup> Christie describes victimization claims as both the source and outcome of cultural change and contestation.<sup>40</sup> Asserting victim status, discussed by Christie within the context of women who experience domestic violence, is a deeply “political claim” that reflects changing social, political, and economic conditions.<sup>41</sup> Victimization thus represents the intersection of observable events and socially desirable characteristics with the groups and individuals who are “powerful enough to make your case known and successfully claim the status of an ideal victim. Or alternatively, that you are not opposed by so strong counter-powers that you can not be heard.”<sup>42</sup> As this suggests, not all individuals have equal power before the law to make persuasive or legitimate their claims to be victims. Furthermore, the determinations of some actors—especially criminal justice officials—carry more weight than others’, such as complainants, in assessments of such claims.

This aspect of Christie’s analysis suggests that the construction of victimization is more fluid and situational than can be captured by static, descriptive characteristics of the parties involved or the circumstances surrounding the assault. Although numerous studies explore whether individuals perceive their own experiences (or actions) as abusive, harmful, or illegal,<sup>43</sup> fewer have examined the situational and relational methods used by criminal justice officials to determine whether and how individuals are legitimate victims of sexual coercion.<sup>44</sup> Scholars such as Elizabeth Stanko<sup>45</sup> and

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38. See Amy Dellinger Page, *Gateway to Reform? Policy Implications of Police Officers’ Attitudes Toward Rape*, 33 AM. J. CRIM. JUST. 44, 45–46 (2008) [hereinafter Page, *Gateway to Reform*] (“The more a victim, or the characteristics of an assault, deviate from this preconceived idea, the less likely police and prosecutors are to devote extensive time and energy to processing the case.”).

39. Christie, *supra* note 7, at 18.

40. *Id.* at 18.

41. *Id.* at 20.

42. *Id.* at 21.

43. See Janice Du Mont, Karen-Lee Miller & Terri L. Myhr, *The Role of “Real Rape” and “Real Victim” Stereotypes in the Police Reporting Practices of Sexually Assaulted Women*, 9 VIOLENCE WOMEN 466, 467–70 (2003) (noting that rape stereotypes continue to influence whether victims decide to report a sexual assault); Mary P. Koss, *The Measurement of Rape Victimization in Crime Surveys*, 23 CRIM. JUST. & BEHAV. 55, 57–65 (1996); Karen G. Weiss, *Neutralizing Sexual Victimization: A Typology of Victims’ Non-Reporting Accounts*, 15 THEORETICAL CRIMINOLOGY 445, 446 (2011) (asserting that a victim’s interpretation of her experiences will determine whether an incident is reported).

44. See Page, *Behind the Blue Line*, *supra* note 28, at 24 (considering studies of influences on police decisions about whether and when to pursue a case).

45. See generally Stanko, *Would you Believe this Woman*, *supra* note 5; Elizabeth Anne Stanko, *The Impact of Victim Assessment on Prosecutors’ Screening Decisions: The Case of the*

Lisa Frohmann<sup>46</sup> use qualitative methods to shed light on prosecutors' determinations of which victims have earned credibility and recognition. Kerstetter and Van Winkle show that detectives shape victims' perceptions of the legal implications of rape reporting to produce outcomes that align most closely with the interests of law enforcement, not the wishes of complainants.<sup>47</sup>

Building on these qualitative studies and incorporating the findings of quantitative research, we argue that determinations regarding the legitimacy of victim status are not solely the result of calculations that add up mitigating factors and subtract deviations from some reified notion of an ideal victim. Rather, cases are shaped by the actions and interactions between women and criminal justice personnel.

Victim narratives and identities present dilemmas for feminist scholars, policy makers, and activists, and have been the subject of debates too complex to address fully here.<sup>48</sup> Victimization can provide a powerful moral and political platform from which to make claims about harm and redress, and victim narratives have been effective in mobilizing resources and attention to assist some women affected by sexual exploitation and coercion.<sup>49</sup> However, observers have also pointed out that victimization language, particularly when

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*New York County District Attorney's Office*, 16 LAW & SOC'Y REV. 225 (1981) [hereinafter Stanko, *Victim Assessment*] (finding that prosecutors' decisions about whether to charge and what charges to lay in sexual assault cases depend on perceived victim credibility and often weighs more heavily than case facts).

46. See generally Frohmann, *Hard Cases*, *supra* note 15; Frohmann, *Discrediting Victims*, *supra* note 4; Frohmann, *Convictability and Discordant Locales*, *supra* note 4; Lisa Frohmann, *Complaint-Filing Interviews and the Constitution of Organizational Structure: Understanding the Limitations of Rape Reform*, 8 HASTINGS WOMEN'S L.J. 365 (1997) [hereinafter Frohmann, *Understanding the Limitations of Rape Reform*]; Lisa Frohmann, *Constituting Power in Sexual Assault Cases: Prosecutorial Strategies for Victim Management*, 45 SOC. PROBS. 393 (1998) [hereinafter Frohmann, *Constituting Power in Sexual Assault cases*].

47. See generally Kerstetter & Van Winkle, *supra* note 15; Kerstetter, *supra* note 5.

48. There are many excellent treatments that address attractions and obstacles posed by victim talk, specifically within movements concerning violence against women. See, e.g., NEW VERSIONS OF VICTIMS: FEMINISTS STRUGGLE WITH THE CONCEPT 1–2 (Sharon Lamb ed., 1999); Linda Alcoff & Laura Gray, *Survivor Discourse: Transgression or Recuperation?*, 18 SIGNS 260, 261 (1993); Lisa D. Brush, *Harm, Moralism, and the Struggle for the Soul of Feminism*, 3 VIOLENCE AGAINST WOMEN 237, 239–40 (1997); Pamela Haag, "Putting Your Body on the Line": *The Question of Violence, Victims, and the Legacies of Second-Wave Feminism*, 8 DIFFERENCES 23, 48–49 (1996); Renee Heberle, *Deconstructive Strategies and the Movement Against Sexual Violence*, 11 HYPATIA 63, 64–65 (1996); Wendy Larcombe, *The "Ideal" Victim v. Successful Rape Complainants: Not What You Might Expect*, 10 FEMINIST LEGAL STUD. 131, 131–32 (2002); Nancy A. Naples, *Deconstructing and Locating Survivor Discourse: Dynamics of Narrative, Empowerment, and Resistance for Survivors of Childhood Sexual Abuse*, 28 SIGNS 1151, 1152 (2003).

49. See Vanessa Barker, *The Politics of Pain: A Political Institutional Analysis of Crime Victims' Moral Protests*, 41 LAW & SOC'Y REV. 619, 625–26 (2007) (noting that victim protest led to movements forcing states to grapple with pertinent moral questions); Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 999–1000 (1985); Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1435 (1993).

used to describe sexual crimes like rape and prostitution, can lead to a paternalistic and disempowering focus on rescue that obscures women's voices in identifying for themselves problems and solutions.<sup>50</sup> Reliance on victim stories also privileges some women (who may fit more closely with the ideal victim narrative) over others in the competition for scarce public resources (investigation, prosecution, treatment options).<sup>51</sup> Legally cognizable claims about victimization often rely on characteristics associated with ideal victims—especially the idea that victims are defined by their powerlessness—that may contradict women's attempts to assert agency and control both during and in the wake of sexual crimes.<sup>52</sup>

### *B. Applying Ideal Victim Theory to Women Affected by Sexual Offenses*

In this Subsection, we show how ideal victim theory has been applied to two different groups of women involved in sexual offenses. The first group is women engaged in prostitution who, under ideal victim theory, would not likely be deemed worthy of investment of resources and attention. The second is women who are sexual assault complainants who, according to ideal victim theory, would seem to be legitimate victims who deserve resources and attention. In both Subsections, we provide a brief backdrop on the legal status and typical case trajectories for each of these groups.

#### *1. Prostitute Women and Ideal Victim Theory*

Prostitution is a criminal offense in every U.S. state except Nevada, which leaves that determination up to the county.<sup>53</sup> Legal responses to prostitution are

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50. See Carolyn Hoyle, Mary Bosworth & Michelle Dempsey, *Labeling the Victims of Sex Trafficking: Exploring the Borderland Between Rhetoric and Reality*, 20 SOC. & LEGAL STUD. 313, 315–16 (2011) (recognizing that labels are often the product of competing interests).

51. See CASSIA SPOHN & KATHARINE TELLIS, *POLICING AND PROSECUTING SEXUAL ASSAULT IN LOS ANGELES CITY AND COUNTY: A COLLABORATIVE STUDY IN PARTNERSHIP WITH THE LOS ANGELES POLICE DEPARTMENT, THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, AND THE LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE* 346–48 (2012), <https://www.ncjrs.gov/pdffiles1/nij/grants/237582.pdf>. For example, though they are least likely to occur, assaults involving strangers, weapons, injuries to the victim, and independent corroboration are described by prosecutors as the most likely cases to be prosecuted. *Id.* at 406.

52. See CARISA R. SHOWDEN, *CHOICES WOMEN MAKE: AGENCY IN DOMESTIC VIOLENCE, ASSISTED REPRODUCTION, AND SEX WORK* 135–84 (2011); *DEMANDING SEX: CRITICAL REFLECTIONS ON THE REGULATION OF PROSTITUTION* 303–04 (Vanessa Munro & Marina Della Giusta eds., 2008); *NEW VERSIONS OF VICTIMS: FEMINISTS STRUGGLE WITH THE CONCEPT* 1–2 (Sharon Lamb ed., 1999); Christie, *supra* note 7, at 27–28; Dorothy Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHIC.-KENT L. REV. 359, 363–64 (1993).

53. Jocelyn Eskow, *Prostitution and Sex Work*, 11 GEO. J. GENDER & L. 163, 165–66 n.13 (2011).

generally guided by morality concerns<sup>54</sup> or by nuisance factors.<sup>55</sup> More recent policy debates have moved away from explicit moral condemnation, although nuisance claims are often inflected with moral judgment.<sup>56</sup> Community complaints related to quality of life and gentrification often focus on collateral harms that prostitution is reputed to bring, such as violence, litter, and drug activity.<sup>57</sup> Whatever the explicit and implicit rationale for existing policy, prostitution is considered an unsavory and stigmatized activity that does not contribute to personal or social good.<sup>58</sup> Women<sup>59</sup> in the United States who sell sex for money are deemed lawbreakers and often face only the punitive side of law enforcement systems and actors.<sup>60</sup> Their sexually transgressive, illegal

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54. See Alysia Castro, *Better in Theory: The Road to Prostitution Reform in Pennsylvania*, 9 RUTGERS J.L. & PUB. POL'Y 37, 44–45 (2012); Johnson, *supra* note 10, at 723–24.

55. Nicole A. Hough, *Sodomy and Prostitution: Laws Protecting the "Fabric of Society"*, 3 PIERCE L. REV. 101, 108–09 (2004) (noting that the "nuisance" of spreading sexually transmitted diseases was a common rationale for criminalizing prostitution).

56. See Corey S. Shdaimah et al., *Neighborhood Assessment of Prostitution as a Pressing Social Problem and Appropriate Responses: Results from a Community Survey*, 25 CRIM. JUST. POL'Y REV. 275, 289 (2014) (suggesting that the perception of prostitution as a problem requiring government intervention may be informed by community views on the association of sex work with other crimes and its perceived impact on neighborhood environment).

57. See ELIZABETH BERNSTEIN, *TEMPORARILY YOURS: INTIMACY, AUTHENTICITY, AND THE COMMERCE OF SEX* 33–34 (2007) (discussing the clearing of "red light" districts in San Francisco); Lisa E. Sanchez, *Boundaries of Legitimacy: Sex, Violence, Citizenship, and Community in a Local Sexual Economy*, 22 LAW & SOC. INQUIRY 543, 575 (1997); Shdaimah, *supra* note 56, at 289; see also Katie Hail-Jares, Catharine Paquette & Margot LeNeveu, *Meeting the New Neighbors: A Case Study on Gentrification and Sex Work in Washington, DC*, in NOT JUST IN THE ALLEYS: EXPANDED PERSPECTIVES ON STREET BASED SEX WORK 13–14 (Katie Hail-Jares, Corey S. Shdaimah, & Chrysanthe Leon eds., 2015) (discussing the creation of "prostitution-free" zones in Washington, DC); Johanna Kantola & Judith Squires, *Discourses Surrounding Prostitution Policies in the UK*, 11 EUR. J. WOMEN'S STUD. 77, 80–86 (2004) (detailing England's revised prostitution policy focusing on nuisance factors such as "kerb-crawling"). Although many of these "quality of life" and "nuisance-related" policies are ostensibly neutral, such programs can make street-based sex workers more vulnerable to violence, health risks, and further stigmatization. See Joanna Brewis & Stephen Linstead, *"The Worst Thing is the Screwing" (2): Context and Career in Sex Work*, 7 GENDER, WORK & ORG. 168, 176 (2000) (addressing the discriminatory attitudes toward sex workers, often due to policy implementation by law enforcement); Teela Sanders, *The Risks of Street Prostitution: Punters, Police and Protesters*, 41 URBAN STUD. 1703, 1712–15 (2004) (noting that community-based policing often displaces street workers, which only transfers the problem into other areas rather than resolving it).

58. Krawiec, *supra* note 3, at 1767–69; Weitzer, *Sociology of Sex Work*, *supra* note 3, at 214 (noting the paradigm of deviance, along with the stigmatization of the profession, and oppression reflects patriarchal stereotypes).

59. In this manuscript, we focus on cisgender women, who account for the majority of prostitution offenders and who comprise nearly the entirety of Shdaimah's sample due to a combination of program eligibility criteria and program participation. However, people of all gender identification engage in prostitution.

60. See Johnson, *supra* note 10, at 218 (asserting that enforcement of prostitution laws "disproportionately harms women").

behavior would by definition appear to exclude women who engage in prostitution from the category of ideal victims.

Although some scholars view prostitution as a means of empowerment or a form of labor,<sup>61</sup> the overriding contemporary characterization of women engaged in prostitution is as victims.<sup>62</sup> Ronald Weitzer argues that this characterization is due to biased research focusing disproportionately on women engaged in street-based survival sex work, which is often considered the most dangerous form of sex work.<sup>63</sup> This characterization is also likely influenced by increasing attention given to the characterization of sex trafficking as a form of “modern day slavery,” which focuses on the figure of the sex slave as an ideal victim, collapsing distinctions between prostitution and sex trafficking.<sup>64</sup> Such depictions lead to assumptions that prostitute women are trafficked and that anyone who engages in prostitution would prefer not to.<sup>65</sup> Throughout most of the world, prostitution is viewed as a form of sexual exploitation.<sup>66</sup> Overarching

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61. Tracy Quan, *The Name of the Pose: A Sex Worker by Any Other Name?*, in PROSTITUTION AND PORNOGRAPHY: PHILOSOPHICAL DEBATE ABOUT THE SEX INDUSTRY 341, 345 (J. Spector ed., 2006); Martha C. Nussbaum, “*Whether from Reason or Prejudice*”: *Taking Money for Bodily Services*, 27 J. LEGAL STUD. 693, 696–97 (1998) (contending that selling sexual services is a form of labor like any other and that legalizing prostitution will provide women with a wider range of opportunities).

62. Jacobson, *supra* note 19, at 1044–45 (declaring that the legalization of prostitution perpetuates a culture of victims by enabling violence and immoral behavior); Johnson, *supra* note 10, at 731–32 (noting that prostitution inherently perpetuates victimization and exploitation).

63. Ronald Weitzer, *Flawed Theory and Method in Studies of Prostitution*, 11 VIOLENCE AGAINST WOMEN 934, 944 (2005) [hereinafter Weitzer, *Flawed Theory*] (determining that street prostitution only accounts for one-fifth of prostitution in the U.S., and that street prostitutes are often more vulnerable to violence than indoor prostitutes); Weitzer, *supra* note 3, at 218.

64. Annie Hill, *Demanding Victims: The Sympathetic Shift in British Prostitution Policy*, in NEGOTIATING SEX WORK: UNINTENDED CONSEQUENCES OF POLICY AND ACTIVISM 77, 78 (Carisa R. Showden & Samantha Majic eds., 2014) (noting that Britain’s Sexual Offenses Act was premised on “narratives of sexual slavery and images of foreign trafficking victims”); Carisa R. Showden & Samantha Majic, *Introduction: The Politics of Sex Work*, in NEGOTIATING SEX WORK: UNINTENDED CONSEQUENCES OF POLICY AND ACTIVISM xii, xiv–xv (2014); Ronald Weitzer, *The Movement to Criminalize Sex Work in the United States*, 37 J. L. & SOC’Y 61, 70–73 (2010) [hereinafter Weitzer, *Movement to Criminalize Sex Work*].

65. *But see* Nussbaum, *supra* note 61, at 696–97 (suggesting that prostitution may provide viable employment opportunities for women, pending the implementation of effective safeguards against harm).

66. Kuo points out that many sex workers’ rights groups contend that although sex work is often exploitative when performed under unsafe and difficult conditions, it is no different from other forms of low wage work that women choose within a limited menu of options. LENORE KUO, PROSTITUTION POLICY: REVOLUTIONIZING PRACTICE THROUGH A GENDERED PERSPECTIVE 134–35 (2002). There is much evidence, in fact, that sex work can be a rational choice among low-wage labor options as it is relatively lucrative, allows for greater autonomy, and allows for easy cycling in and out of the labor market. *See* Eva Rosen & Sudhir A. Venkathesh, *A “Perversion” of Choice: Sex Work Offers Just Enough in Chicago’s Urban Ghetto.*, 37 J. CONTEMP. ETHNOGRAPHY 417–18, 425 (2008) (explaining that sex work enables individuals with little means to provide economically for themselves and family, while also allowing them quick and easy access to work on an as-needed basis); Corey Shdaimah & Chrysanthi Leon, “*First and Foremost They’re*



narratives of prostitute women as helpless victims forced into sex work by evil actors obscures the impact of structural factors, such as inequality, migration, and economic deprivation, that often lead women to choose prostitution,<sup>67</sup> further cementing cultural understandings of women as victims in need (and deserving) of assistance, rather than strategic actors.

The growing number of diversion programs as alternative criminal justice responses to prostitution in the United States are evidence of changes in normative constructions of offending and culpability in regards to prostitution.<sup>68</sup> Diversion programs combine an evolving understanding of women charged with prostitution as simultaneously/potentially victims and offenders, mixing notions of danger, nuisance, harm, and victimization.<sup>69</sup> Prostitution diversion programs are part of the problem-solving justice movement that blends rehabilitation with treatment.<sup>70</sup> Problem-solving justice views particular populations (such as veterans or people who struggle with mental illness) or particular crimes (domestic violence or prostitution) as underlying problems that cause people to break the law.<sup>71</sup> Problem-solving programs provide a space to view such

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*Survivors*": *Selective Manipulation, Resilience and Assertion among Prostitute Women*, FEMINIST CRIMINOLOGY, 326, 340–41 (2014).

67. Edith Kinney, *Raids, Rescues, and Resistance: Women's Rights and Thailand's Response to Human Trafficking*, in NEGOTIATING SEX WORK: UNINTENDED CONSEQUENCES OF POLICY AND ACTIVISM 150–51 (2014); Shdaimah & Leon, *supra* note 66, at 340.

68. *See, e.g.*, DARIA MUELLER, CHICAGO COALITION FOR THE HOMELESS, TREATMENT COURTS AND COURT-AFFILIATED DIVERSION PROJECTS FOR PROSTITUTION IN THE UNITED STATES 9 (2012), [http://www.chicagohomeless.issuelab.org/resource/treatment\\_courts\\_and\\_court\\_affiliated\\_diversion\\_projects\\_for\\_prostitution\\_in\\_the\\_united\\_states](http://www.chicagohomeless.issuelab.org/resource/treatment_courts_and_court_affiliated_diversion_projects_for_prostitution_in_the_united_states).

69. *Id.* at 2–5.

70. As of 2007, there were more than 2,500 problem-solving courts in the U.S., with the overwhelming majority being drug courts. ROBERT V. WOLF, CENTER FOR COURT INNOVATION, PRINCIPLES OF PROBLEM-SOLVING JUSTICE 1 (2007), <http://www.courtinnovation.org/sites/default/files/Principles.pdf>; *see also* C. WEST HUDDLESTON & DOUGLAS B. MARLOWE, NAT'L DRUG COURT INST., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT CARD ON DRUG COURTS AND OTHER PROBLEM SOLVING COURT PROGRAMS IN THE UNITED STATES 2 (2008), [http://www.nadcp.org/sites/default/files/nadcp/PCP%20Report%20FINAL\\_2.PDF](http://www.nadcp.org/sites/default/files/nadcp/PCP%20Report%20FINAL_2.PDF) (noting that as of 2009, there were more than 3,600 drug and problem-solving courts in the U.S.). Additionally, problem-solving courts are increasingly popular with judges. *See* Donald J. Farole, *Problem Solving and the American Bench*, 30 JUST. SYS. J. 1, 51, 65 (2009) (noting that problem-solving courts are very popular with judges, as the Conference of Chief Justices (CCJ) and the Conference of State Administrators (COSCA) endorsed them in 2000, calling for investment of federal dollars to support their development at its 56th Annual Meeting on July 29, 2004); *see also* CONFERENCE OF THE CHIEF JUSTICES/CONFERENCE OF STATE COURT ADMINISTRATORS, RESOLUTION 22: IN SUPPORT OF PROBLEM-SOLVING COURT PRINCIPLES AND METHODS (2004), <http://cosca.ncsc.org/~media/Microsites/Files/COSCA/Policy%20Papers/Resolution-Nat%20Agenda-Final-Aug-04.ashx>; *SAMHSA Awards More Than \$38.2 Million to Help Expand Adult Drug Treatment Courts*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION (Oct. 2, 2009), <http://www.samhsa.gov/newsroom/advisories/0910024929.aspx> (noting that the federal government has invested significant funding in the development of special drug courts).

71. WOLF, *supra* note 70, at 7; J.L. NOLAN, REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT 204–08 (2001). *See generally* Richard Boldt, *The "Tomahawk" and the "Healing Balm": Drug Treatment Courts in Theory and Practice*, 9 U. MD. L.J. RACE, RELIGION,

criminalized behaviors as intelligible and amenable to intervention.<sup>72</sup> They are thus compatible with the mixed and sometimes internally inconsistent understanding that prostitute women are both victims in need of assistance and offenders engaging in socially damaging behaviors subject to criminal sanction.<sup>73</sup> Criminal justice affiliated prostitution diversion programs arise from within the linked discourses of prostitution and problem-solving justice that view addiction, abuse, and trauma as underlying causes that lead women to engage in prostitution, potentially recasting them as victims in need of services rather than as undeserving offenders.<sup>74</sup> They have also been critiqued as combining elements of rescue with paternalism and control, raising concerns about whether it is appropriate to provide therapy in penal settings.<sup>75</sup> Women enter such programs with the expectation that they (provisionally) deserve resources and recognition; the programs, services, discourse, and interactions with criminal justice personnel are designed with this goal in mind.

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GENDER & CLASS 45, 47–48 (2010) [hereinafter Boldt, *Drug Treatment Courts*]; Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L. REV. 1205, 1225 (1998) [hereinafter Boldt, *Rehabilitative Punishment*]; Ursula Castellano, *Courting Compliance: Case Managers as “Double Agents” in the Mental Health Court*, 36 LAW & SOC. INQUIRY 484, 488 (2011); Candace McCoy, *The Politics of Problem-Solving: An Overview of the Origins and Development of Therapeutic Courts*, 40 AM. CRIM. L. REV. 1513, 1515 (2003); Mae C. Quinn, *The Modern Problem-Solving Court Movement: Domination of Discourse and Untold Stories of Criminal Justice Reform*, 31 WASH. U. J.L. & POL’Y 57, 59 (2009) [hereinafter Quinn, *Modern Problem-Solving*]; *Developments in the Law of Mental Illness*, 121 HARV. L. REV. 1114, 1120 (2008) (noting the rise of mental health courts as an attempt to employ a rehabilitative approach within the criminal justice system).

72. WOLF, *supra* note 70, at 3–6; NOLAN, *supra* note 71, at 205–06; Boldt, *Rehabilitative Punishment*, *supra* note 71, 1209–11.

73. Jacobson, *supra* note 19, at 1028, 1030; Mae C. Quinn, *Revisiting Anna Moscovitz Kross’s Critique of New York City’s Women’s Court: The Continued Problem of Solving the “Problem” of Prostitution with Specialized Criminal Courts*, 33 FORDHAM URB. L.J. 665, 670–71 (2006) [hereinafter Quinn, *Continued Problem*] (noting that the first prostitution night court, which had many elements similar to the modern prostitution problem court, was created in Manhattan over 100 years ago).

74. Jacobson, *supra* note 19, at 1026; Corey Shdaimah & Marie Bailey-Kloch, “Can You Help With That Instead of Putting Me in Jail?”: Participant Insights on Baltimore City’s Specialized Prostitution Diversion Program, 35 JUST. SYST. J. 262, 262–63 (2014); Corey Shdaimah & Shelly Wiechelt, *Converging on Empathy: Perspectives on Baltimore City’s Specialized Prostitution Diversion Program*, 22 WOMEN & CRIM. JUST. 156, 161, 164 (2012) (providing accounts from a study with women engaged in street prostitution about their struggles with childhood abuse, addiction, and mental health problems, which contributed to their entrance and continued engagement in prostitution).

75. CYNTHIA HUIJARR ORR, AMERICA’S PROBLEM-SOLVING COURTS: THE CRIMINAL COSTS FOR TREATMENT AND THE CASE FOR REFORM 38 (2009); Boldt, *Rehabilitative Punishment*, *supra* note 71, at 1216–17; Quinn, *Modern Problem-Solving*, *supra* note 71, at 70–71, 79; Corey S. Shdaimah, *Taking a Stand in a Not-So-Perfect World: What’s a Critical Supporter of Problem-Solving Courts to Do*, 9 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 89, 101–02 (2010) [hereinafter Shdaimah, *Taking a Stand*].

## 2. Sexual Assault Victims and Ideal Victim Theory

Sexual contact that involves force, threat of force, and non-forcible coercion is criminalized in every state, though terms, definitions, and penalties vary widely.<sup>76</sup> In general, crime victims are assumed to command public sympathy and political power;<sup>77</sup> sexual violence is widely regarded as a particularly powerful platform for those victims to advance claims on the state.<sup>78</sup>

Despite this rhetoric, feminist researchers and theorists have long argued that, in practice, criminal justice and societal responses to rape continue to reflect myths that deny the legitimacy of many forms of sexual violence.<sup>79</sup> Although some sexual offenses have historically been treated with the utmost seriousness (for example, the rape of a white woman by a black man, or sexual offenses against children by strangers), other crimes (for example, attacks on black and Native women by white men, or assaults against women engaged in “risky” behavior such as hitchhiking, drinking, or prostitution) have long been dismissed or blamed on the victim.<sup>80</sup> As observers point out, law enforcement decisions

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76. See Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39, 89–91 (2014).

77. Barker, *supra* note 49, at 625–26 (explaining the origins of the crime victims’ movement); Angela P. Harris, *The Jurisprudence of Victimhood*, 3 SUP. CT. REV. 77, 79 (1991) (noting the power of the “victim impact statement”); Jonathan Simon, *Megan’s Law: Crime and Democracy in Late Modern America*, 25 LAW & SOC. INQUIRY 1111, 1136 (2000) (explaining the rise of victims’ rights movements in shaping public policy responses to crime). Despite assertions about the universal appeal of victimization as a platform for making claims on political resources, it is clear that in sexual assault and many other types of crimes, victims are much more likely to be deemed worthy of state resources when they are white. See Kristen Bumiller, *Rape as a Legal Symbol: An Essay on Sexual Violence and Racism*, 42 U. MIAMI L. REV. 75, 85–87 (1987); Lisa L. Miller, *The Invisible Black Victim: How American Federalism Perpetuates Racial Inequality in Criminal Justice*, 44 LAW & SOC’Y REV. 805, 805–06 (2010).

78. JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 108–09 (2007); Stuart Scheingold, Toska Olson & Jana Pershing, *Sexual Violence, Victim Advocacy, and Republican Criminology: Washington State’s Community Protection Act*, 28 LAW & SOC’Y REV. 729, 729–30 (1994).

79. Common rape stereotypes include: individuals are primarily at risk from stranger assaults; women precipitate rape through their behavior; real rape involves force and results in physical injury; real victims respond to trauma in consistent and predictable ways; and women routinely lie about sexual assault for their own benefit. See Burt, *supra* note 36, at 217; Katie Edwards et al., *Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change*, 65 SEX ROLES 761, 762 (2011); Page, *True Colors*, *supra* note 28, at 316–17; Emma Sleath & Ray Bull, *Comparing Rape Victim and Perpetrator Blaming in a Police Officer Sample*, 39 CRIM. JUST. BEHAV. 646, 646–47 (2012) (determining that victims of acquaintance rape and victims under the influence of alcohol are afforded less credibility).

80. BROWNMILLER, *supra* note 36, at 175, 214, 271–72; DIANA E.H. RUSSELL, THE POLITICS OF RAPE: THE VICTIM’S PERSPECTIVE 129, 148, 221 (1974); Kimberly Lonsway & Louise Fitzgerald, *Attitudinal Antecedents of Rape Myth Acceptance: A Theoretical and Empirical Reexamination*, 68 J. PERSONALITY & SOC. PSYCHOL. 704, 704 (1995) [hereinafter Lonsway & Fitzgerald, *Attitudinal Antecedents*]; Kimberly A. Lonsway & Louise F. Fitzgerald, *Rape Myths:*

about whether to pursue sexual assault reports can hinge on demographic and socioeconomic indicators, with sexual exploitation of women from marginalized communities—including women of color, women engaged in prostitution, and low-income women—ridiculed, dismissed, and normalized.<sup>81</sup> Though many researchers studying criminal case outcomes do not use Christie’s exact language of “ideal victims,” the types of participant and incident characteristics identified as salient in determining case outcomes closely track Christie’s general framework, which emphasizes a victim’s social status, perceptions of the assailant, and circumstances of the assault.<sup>82</sup>

Many researchers point to the formal and informal legal rules such persistent beliefs produce as key elements in continued high attrition of sexual assault cases in the criminal justice system.<sup>83</sup> But the effects of ideal victims are not confined to criminal justice personnel.<sup>84</sup> Individuals may feel conflicted about whether their own experiences were “really” rape and thus deserving of legal redress.<sup>85</sup> Scholars have also used ideal victim theory to explore how social movements selectively identify and deploy claims or images of victimization to mobilize communities, law enforcement agencies, and policymakers.<sup>86</sup>

### C. *The Arena of Intelligibility as an Alternative Explanation*

In this Subsection we describe the Arena of Intelligibility, a tool that we have developed to better explain and analyze how criminal justice systems treat women involved with sexual crimes. The Arena depicts how claims about

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*In Review*, 18 PSYCHOL. WOMEN Q. 133, 134 (1994) [hereinafter Lonsway & Fitzgerald, *Rape Myths*].

81. NANCY MATTHEWS, CONFRONTING RAPE: THE FEMINIST ANTI-RAPE MOVEMENT AND THE STATE 141 (1994); DANIELLE L. MCGUIRE, AT THE DARK END OF THE STREET: BLACK WOMEN, RAPE, AND RESISTANCE—A NEW HISTORY OF THE CIVIL RIGHTS MOVEMENT FROM ROSA PARKS TO THE RISE OF BLACK POWER 139, 160–61, 164 (2010); Michelle S. Jacobs, *Prostitutes, Drug Users, and Thieves: The Invisible Women in the Campaign to End Violence Against Women*, 8 TEMP. POL. & CIV. RTS. L. REV. 459, 463, 472–73 (1999); Miller & Schwartz, *supra* note 3, at 13–14.

82. SPOHN & HORNEY, *supra* note 2, at 112; Alderden & Ullman, *supra* note 1, at 527–28; Du Mont & Myhr, *supra* note 6, at 1114.

83. See Alderden & Ullman, *supra* note 1, at 540–41; Frohmann, *Discrediting Victims*, *supra* note 4, at 215–19; Frohmann, *Convictability and Discordant Locales*, *supra* note 4, at 535–38; Page, *True Colors*, *supra* note 28, at 325, 327; Page, *Gateway to Reform*, *supra* note 38, at 45–46.

84. See Du Mont, Miller & Myhr, *supra* note 43, at 467–70.

85. *Id.* at 468–70; HANDBOOK OF VICTIMS AND VICTIMOLOGY 30–31 (Sandra Walklate ed., 2007); Esther I. Madriz, *Images of Criminals and Victims: A Study on Women’s Fear and Social Control*, 11 GENDER & SOC’Y 342, 348–52 (1997).

86. Carolyn Hoyle, Mary Bosworth & Michelle Dempsey, *Labeling the Victims of Sex Trafficking: Exploring the Borderland Between Rhetoric and Reality*, 20 SOC. & LEGAL STUD. 313, 324 (2011) (“The rhetoric of slavery is evident in police notions about rescuing [sex trafficking] victims.”); Erin O’Brien, *Ideal Victims in Human Trafficking Awareness Campaigns*, in CRIME, JUSTICE AND SOCIAL DEMOCRACY: INTERNATIONAL PERSPECTIVES 315, 315 (Kerry Carrington et al. eds., 2013).

victim identities are interpreted, shaped, and ultimately recognized (or not) by legal officials.

The Arena is a useful metaphor for several reasons. Spatially and literally, an arena is “an enclosed area” used for public events; conceptually, it denotes “a sphere of interest, activity, or competition.”<sup>87</sup> We find the image useful in suggesting a bounded space in which parties struggle to define themselves and make their claims. The claims about victimization we examine here are alternatively authorized and limited by formal legal rules and procedures.<sup>88</sup> Even when practices appear to be informal, these interactions occur “in the shadow of the law”: relying upon, invoking, and forecasting formal legal rules and procedures.<sup>89</sup> Although the terrain, behaviors, and strategies employed within the Arena may vary, there is, in the end, a limited set of potential outcomes. Additionally, the arena metaphor highlights the centrality of contestation. The data that we present in Part III demonstrates that being recognized as a “legitimate” victim is an achieved status, not a preexisting category.<sup>90</sup> We argue that the case outcomes of women who come to the attention of criminal justice officials as a result of sexual crimes are not fully or exhaustively determined by their initial entry point into the criminal justice system as victims of sexual violence or prostitution offenders. Although claims about victimization *are* influenced by characteristics of the participants and the offense, as ideal victim theory suggests and quantitative studies confirm, legitimacy is *also* actively contested, conferred, and withheld as state actors provoke, affirm, and assess behaviors and actions of women over the course of their criminal justice involvement.<sup>91</sup> Such adversarial processes are designed to identify which women are legitimate victims by making sense of their actions, affect, and experiences within bounded societal, political, and legal norms about gendered behavior, sexuality, and crime.

We provide a spatial representation of the Arena in Figure 1. For our specific purposes here, we focus on two state-conferred benefits that accrue to women

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87. *Arena*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/arena>.

88. *See generally* SPOHN & HORNEY, *supra* note 2, at 17–31 (noting that these legal rules and procedures include the criminal laws governing sexual assault and prostitution cited above, as well as rules of evidence).

89. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950 (1978). Mnookin and Kornhauser coined the term “in the shadow of the law” to describe the way that people take into account the law and legal implications of their actions when they interact and negotiate with other people and within systems, even when formal legal rules are not invoked. They posit that even apparently “informal” interactions and negotiations, such as the divorce settlements, do not take place in a vacuum, but are rather influenced by and filtered through the parties’ understanding and forecasting of legal rules, rights, and claims. *Id.* at 996–97.

90. *See infra* Part III and accompanying text.

91. *See, e.g.*, Lord & Rassel, *supra* note 4, at 155 (addressing the adversarial nature of law enforcement questioning).

deemed legitimate victims: *resources* and *recognition*. We define *resources* as the tangible, material investments in a case or an individual. These may include the investigation or prosecution of a sexual assault report. In the case of the prostitution diversion programs, resources include the provision of addiction and/or trauma recovery programs, assistance accessing governmental benefits, and, ultimately, the withdrawal of criminal charges and/or expungement of a woman's record for prostitution. In contrast to these material benefits, we conceptualize *recognition* as the extent to which criminal justice personnel view the woman and her situation as a proper recipient of care, concern, and attention. Recognition is thus an element linked to assessments of a woman's legitimacy and moral worth in the context of claims about victimization.

In order to suggest the ways that resources and recognition can both overlap and converge, we divide the Arena into quadrants indicating higher and lower allocations of these benefits. Although *resources* and *recognition* may overlap, we posit that they are not fully coterminous or inextricably linked. For example, law enforcement officials may view some victims of sexual violence with great sympathy, such as a woman assaulted by a stranger, even as those officials may be hampered investigating and prosecuting such a case by inherent limitations, such as inability to identify the assailant. Such a woman might receive high recognition as a victim but low investment of resources, thus placing her in the top-left quadrant of the Arena.<sup>92</sup> Conversely, a woman who fulfills all the formal requirements of the prostitution diversion program might receive benefits, including dismissal of charges, while failing to convince program staff that she has fully "reformed" and thus may be seen as "gaming the system." That woman would be located in the bottom-right quadrant, indicating that she has received significant resources but not recognition as a victim.

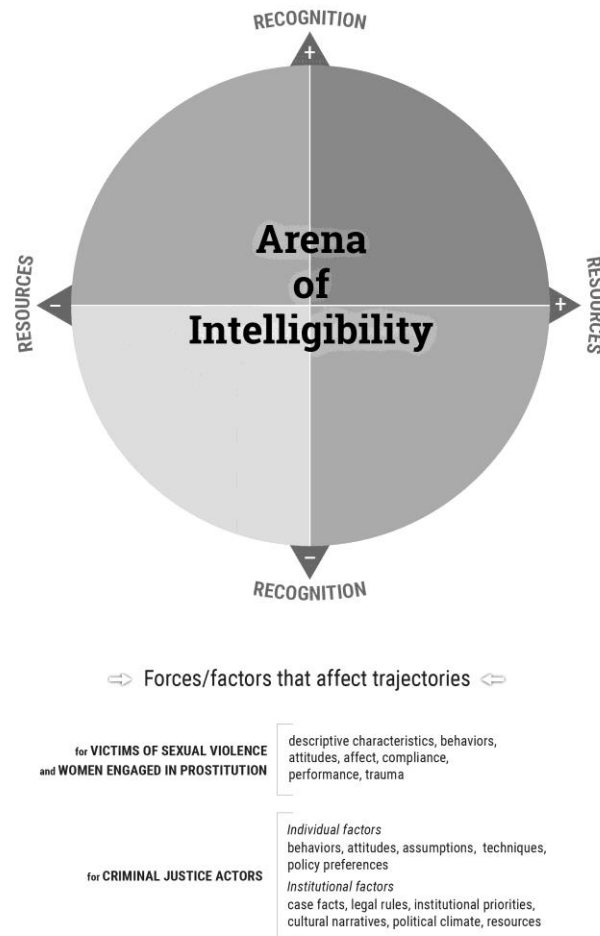
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92. Spohn and Tellis quote a detective in their study who exemplifies this quadrant. The detective expresses *recognition* of the victim claims made by some women, but also recognizes the inherent limitations of devoting investigatory *resources* to such allegations due to the victim's inability to provide basic information about the assault, stating:

It's really hard when they've consumed drugs and alcohol and they don't know what's happened and there's not a lot of evidence. It is so hard to investigate. I'm sure in a lot of those instances they were victims but it's so hard to investigate them given their lack of ability to recall.

SPOHN & TELLIS, *supra* note 51, at 227.

FIGURE 1



Rather than simply plotting victims to a single point in the Arena, as if victimization were merely a mathematical “score” derived by adding and subtracting demographic or aggravating and mitigating factors, we use our case studies, below, to show how determinations are influenced by the facts, attitudes, and behaviors of both the women coming before criminal justice personnel and criminal justice personnel themselves (see Figure 1). Each map below includes points of inflection in the case of the woman whose story is illustrated. These points indicate key moments where the direction of the case trajectory is influenced by choices about which investigatory techniques are applied, what

information is provided, and how information is interpreted. In mapping women's trajectories through the Arena, we represent the forces that act on cases with arrows to indicate how such actions push, pull, and direct the case trajectory toward higher or lower investment of resources and recognition.

In rejecting static notions about victimization, we are inspired by theorists such as Ian Hacking,<sup>93</sup> whose work on "looping" argues that practices of classification not only stimulate behaviors and produce identities, but also create an active and iterative process between those with the power to identify and the individuals and groups being classified. Hacking asserts that there is a

looping or feedback effect involving the introduction of classifications of people. New sorting and theorizing induces changes in self-conception and in behaviour of the people classified. Those changes demand revisions of the classification and theories, the causal connections, and the expectations. Kinds are modified, revised classifications are formed, and the classified change again, loop upon loop.<sup>94</sup>

Such processes, Hacking points out, have "an even more amazing power than that of opening possibilities for future action. They enable us to redescribe our past to the extent that people can come to experience new pasts."<sup>95</sup>

In contrast to research on victimization that focuses on the relationships between "facts" (such as demographics of perpetrators and victims, or characteristics of an assault or arrest) and subsequent legal outcomes, the Arena draws our attention to the dynamic and ongoing processes that themselves *produce* relevant facts and outcomes, which often occur before or outside formal decision-making processes.<sup>96</sup> We posit that although personal and demographic characteristics of the victim are relevant, they do not ineluctably dictate particular criminal justice responses.

We illustrate the insufficiency of predictions about who will be recognized as a victim with the case of Linda, whose story opened this Article. As an African American woman with a history of prostitution who alleges that she was assaulted by a police officer, scholars of both sexual assault and prostitution would almost certainly predict that Linda would receive neither resources nor recognition for her sexual assault claim.<sup>97</sup> Ideal victim theory suggests that as Linda enters the Arena by making her sexual assault complaint (point 1), criminal justice actors will apply their "knowledge" about her (point 2). Given Linda's descriptive characteristics and history of prostitution arrests, we would

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93. Ian Hacking, *The Looping Effects of Human Kinds*, in *CAUSAL COGNITION: A MULTI-DISCIPLINARY DEBATE* 351, 370 (Dan Sperber, David Premack, & Ann James Premack eds., 1995).

94. *Id.* at 370.

95. *Id.* at 368.

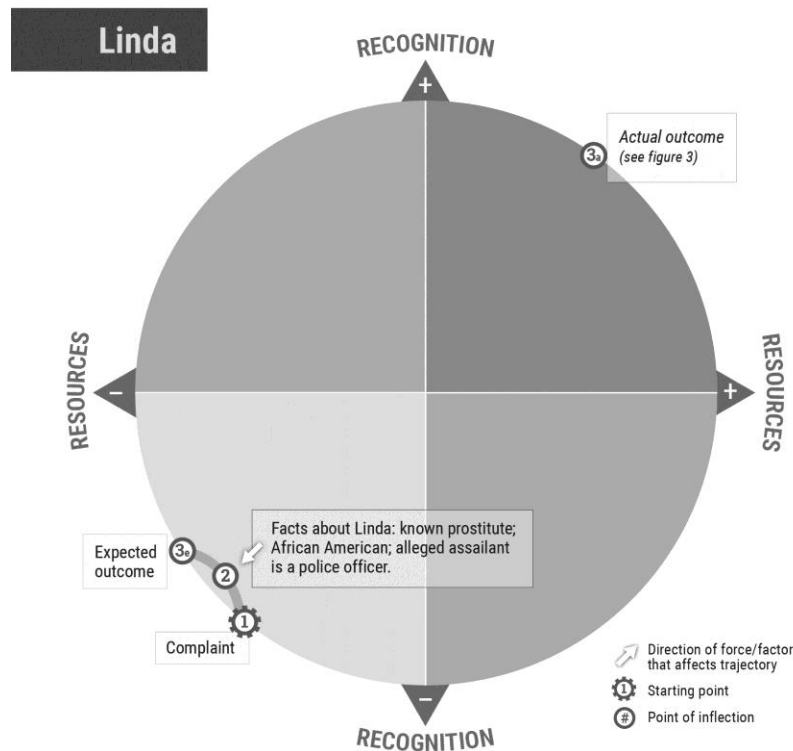
96. See generally Alderden & Ullman, *supra* note 1, at 541–43 (determining that extralegal factors significantly influence law enforcement's decision-making process in determining whether to investigate a crime).

97. See *supra* note 1 and accompanying text.



assume that her case trajectory is going to stay in the very lowest quadrant for both resources and recognition, with law enforcement officials giving her case only a cursory examination at best. The expected outcome, indicated at point 3e, is that Linda receives no legal redress. However, that expected outcome differs significantly from Linda's actual experience, indicated at point 3a. Rather than having her case dismissed, Linda ends up in the top-right quadrant, enjoying high resources and recognition from criminal justice officials. How can this counterintuitive outcome be explained?

FIGURE 2



Our data show that in their drive to render women affected by sexual crimes intelligible, legal actors attempt to create coherent narratives about individuals and crimes. Intelligibility is constructed through the interplay of several forces: women's representations of themselves; criminal justice officials' individual preferences (including the investigatory techniques that are informed by their

individual assumptions and beliefs about the women they encounter); and institutional forces that make some responses viable and others unlikely. Each of these elements is described in more detail below.

*Descriptive characteristics* and *case facts* are relevant elements of the narrative, but they only take on meaning in context. Criminal justice personnel may interpret ostensibly static factors (such as race, class, or relationship between the parties involved) differently based on the intersection of those factors with other information. Lisa Frohmann, for example, shows that prosecutors commonly dismiss allegations of sexual assault when they believe that they cannot explain the lives of victimized women to juries composed of people whose lives are culturally and economically different from these victims.<sup>98</sup> Characteristics of the complainant such as her race or class take on legal import when elements such as geographic location, relationship to offender, non-normative or proscribed behaviors have to be translated for a hypothetical jury who, prosecutors assume, will not understand victim behavior that conflicts with their expectations.<sup>99</sup> Even if unrelated to the alleged incident, criminal justice actors may interpret these factors and behaviors as relevant to the illegal activity, facilitating or discouraging whether official recognition and resources are conferred upon individual women.<sup>100</sup>

Such additional information is elicited by legal professionals through a variety of *techniques* that prompt behaviors and signal attitudes to victim claimants who respond to those demands and cues with their own behaviors. These behaviors then produce case outcomes with immediate and programmatic implications (Hacking's "loop upon loop").<sup>101</sup> We have chosen here to highlight our data on how women's *responses to questioning*, *demonstrations of (non)compliance*, and *representations of trauma* are structured, ascertained, and interpreted by criminal justice officials, though we acknowledge that these are only some of the many factors that might be important in these and other cases. Criminal justice personnel employ a variety of strategies to gather and interpret information when deciding whether women are legitimate recipients of symbolic and material resources. Such techniques yield different results even in "similar" cases. New information, interactions, and behaviors influence the case trajectories; these elements interact in dynamic ways that cannot always be predicted based on where women initially enter the Arena. The range of possibilities are, however, constrained by the *legal rules* and *societal norms* which constitute the general field of play and the limits of potential outcomes. The relative importance of these factors may shift over time as societal norms

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98. Frohmann, *Convictability and Discordant Locales*, *supra* note 4, at 551–52.

99. *Id.* at 538–40.

100. *Id.* at 538 (noting that prosecutors have discussed how living in a low-income neighborhood characterized by high rates of crime and disorder makes complainants less credible to juries).

101. Hacking, *supra* note 93, at 370.

and beliefs around sexuality, gendered behavior, and criminal offending evolve and change, especially regarding particular groups of victims or offenders.

*Political priorities* set at the national or state level can constrain some options and incentivize others. Legislative imposition of mandatory minimum sentencing schemes, requirements to comply with administrative guidelines, or availability of funding for alternatives to incarceration all significantly shape legal outcomes.<sup>102</sup> These political priorities, which may change rapidly with turnover in executive power, intersect with preexisting and often long-standing *institutional goals* of criminal justice systems, such as the drive to close investigations or cases, to maintain a high conviction rate, or to enhance community safety.<sup>103</sup> Institutions, however, are not frictionless, self-implementing machines, and criminal justice personnel—including police, prosecutors, public defenders, probation and parole officers, victim advocates, and social workers—can operate with markedly different understandings of the aims of legal systems.<sup>104</sup> The *personal preferences* of criminal justice actors

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102. See Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183, 190, 198 (2007) (describing a situation where a prosecutor offered a more lenient plea deal, even though the evidence was sufficiently incriminating, in order to mitigate the harsh sentence imposed by mandatory minimums); see also McCoy, *supra* note 71, at 1525–27 (noting that drug courts were established, among other reasons, as an alternative to the mandatory minimum sentencing system, in an attempt to restore judicial discretion); Ilene Nagel & Stephen Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 557 (1992) (finding that new federal sentencing guidelines promulgated in 1984 led to significant changes in prosecutorial behavior as well as widespread efforts by both prosecutors and judges to evade the guidelines through manipulation of charging and plea bargaining processes).

103. Qualitative studies of law enforcement behavior strongly support the idea that institutional priorities, caseload pressures, and individual pressures shape determinations about “credible victims” and “solid cases.” Furthermore, these officials interact with complainants—especially through framing and forecasting future events such as a full-blown trial—to achieve outcomes that fit most closely with those desired by law enforcement, whether that means a complainant continuing with or dropping out of the legal process. See Frohmann, *Constituting Power in Sexual Assault Cases*, *supra* note 46, at 399 (explaining how case dismissal is impacted by the difference between *believable* cases where a prosecutor may believe a victim, but is not confident that a conviction will result, and *convictable* cases where a prosecutor both believes the victim and is confident the court will return a guilty verdict); Kerstetter, *supra* note 5, at 309; Kerstetter & Van Winkle, *supra* note 15, at 270 (explaining how detectives and prosecutors attempt to influence victims by encouraging or discouraging complainants based on congruence with the official’s workload, institutional priorities, and moral judgments about the case); Stanko, *Victim Assessment*, *supra* note 45, at 229; STANKO, *Would you Believe this Woman*, *supra* note 5, at 70 (noting that prosecutors often view sexual assault victims through a stereotypical lens to promote “organizational predictability”).

104. See, e.g., Castellano, *supra* note 71, at 508 (concluding that case managers must understand how to interpret the language of the criminal justice system and the world of social work to advocate effectively for their clients); Rekha Mirchandani, *What’s So Special about Specialized Courts? The State and Social Change in Salt Lake City’s Domestic Violence Court*, 39 LAW & SOC’Y REV. 379, 393–94, 405 (2005) (finding from results of a study of a domestic violence court that bureaucratic goals of efficiency and effectiveness may, in certain circumstances, complement responses grounded in feminist values and understandings of violence against women).

also influence how both political priorities and institutional norms are translated on the ground.<sup>105</sup> Though somewhat constrained by rules and procedures, law enforcement officials who believe that policy responses are ill-informed or unjust often enjoy significant discretion that permits them to evade or adapt the letter of the law to their preferred ends.<sup>106</sup>

We see the Arena as a space in which women's actions and behaviors are interpreted and shaped by criminal justice actors, occurring within a broader legal context influenced by internal and external forces and priorities. Our conceptualization of the Arena not only illustrates the fluid nature of victim status, but remedies the deficiencies of models that erase the agency of actors—whether these are victims, criminal justice officials, or social workers—by suggesting that individual and institutional factors produce case outcomes without any apparent will or action on the part of these participants.<sup>107</sup> Thus, while we value the insights that can be derived from large sample quantitative studies, the interactive and iterative processes we seek to explore here elude, resist, and complicate quantification as a means to identify the determinants of case outcomes.

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105. See Burke, *supra* note 102, at 190, 198; Kerstetter, *supra* note 5, at 309; Kerstetter & Van Winkle, *supra* note 15, at 277–78; Nagel & Schulhofer, *supra* note 102, at 545–46 (explaining competing tensions among law enforcement officials regarding procedures, lack of familiarity with sentencing guidelines, and usurpation of power by others).

106. ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007); STEVEN WILLIAMS MAYNARD-MOODY & MICHAEL CRAIG MUSHENO, *COPS, TEACHERS, COUNSELORS: STORIES FROM THE FRONT LINES OF PUBLIC SERVICE 10–11* (2009); Burke, *supra* note 102, at 189 (noting that prosecutors also exercise enormous discretion during court proceedings such as charging and negotiating plea bargains); Mona Lynch & Marisa Omori, *Legal Change and Sentencing Norms in the Wake of Booker: The Impact of Time and Place on Drug Trafficking Cases in Federal Court*, 48 *LAW & SOC'Y REV.* 411, 417 (2014) (explaining that the Booker Guidelines shifted discretionary power from judges to prosecutors, thereby impeding uniformity in sentencing outcomes); Nagel & Schulhofer, *supra* note 102, at 544 (“[L]ine AUSAs have almost total discretion over charging decisions and substantial discretion over the negotiation of pleas.”); Marjorie S. Zatz & Nancy Rodriguez, *The Limits of Discretion: Challenges and Dilemmas of Prosecutorial Discretion in Immigration Enforcement*, 39 *LAW & SOC. INQUIRY* 666, 679 (2014) (noting that the flexibility afforded by discretion is essential to immigration officials who must frequently adapt to varying circumstances and resources).

107. Though, of course, some of the work we have cited earlier does emphasize the importance of both individual and institutional factors in shaping decisions concerning whether and how systems respond to criminal complaints. See, e.g., Beichner & Spohn, *supra* note 12, at 488 (finding that extralegal factors significantly affect prosecutors' decisions to charge); Frohmann, *Convictability and Discordant Locales*, *supra* note 4, at 535 (noting that factors, such as the likelihood a jury would return a guilty verdict and court policies, strongly influence a prosecutor's decision to charge); Holleran, Beichner & Spohn, *Examining Charging Agreement*, *supra* note 12, at 409–10 (finding that prosecutors consider policies and procedures, as well as the likelihood of a conviction, when determining whether to charge a suspect). See generally Kerstetter & Van Winkle, *supra* note 15.

## II. METHODOLOGY

This project arises out of shared substantive interests and methodological commitments. Our research overlaps both in content—looking at women affected by sexual offenses—and in orientation toward qualitative methods to generate rich and unexpected insights. Although quantitative studies with large sample sizes are useful for spotting broad trends, they fall short in explaining what have been called “black box” questions concerned with *how* processes work.<sup>108</sup> These quantitative studies also have trouble describing complex and fluid phenomena, such as the examination of processes and human interactions.<sup>109</sup> Qualitative research is a particularly appropriate empirical method for examining decision-making processes, which are dynamic and influenced by a variety of individual and organizational factors.<sup>110</sup> In both of our studies, qualitative data were collected and analyzed to generate a detailed description<sup>111</sup> and to build theory.<sup>112</sup>

One of the more common methods used to enhance the rigor of qualitative studies is the practice of “peer debriefing,” whereby researchers discuss methods, findings, and analysis with colleagues.<sup>113</sup> This Article grew out of several years of dialogue between the authors who collaborated as peer debriefers, sharing data and drafts of our work, common ideas, themes, and questions that crossed our substantive areas of inquiry. The authors’ studies involved women who are marginalized within (and often outside of) the criminal justice system due to the perception that their behavior is sexually aberrant. We were intrigued by the ways that law enforcement officials’ perceptions of our study populations seemed to shift, sometimes unpredictably, between seeing them as criminals and/or as victims. The juxtaposition of these groups provides a window into criminal justice understandings of women and sexuality through

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108. JOSEPH A. MAXWELL, *QUALITATIVE RESEARCH DESIGN: AN INTERACTIVE APPROACH* 29 (3rd ed. 2013).

109. *Id.*

110. Maxwell describes qualitative research as a “process theory” approach to explanation, which “tends to see the world in terms of people, situations, events, and the processes that connect these.” *Id.* at 29. Maxwell notes that qualitative research is particularly well suited for a number of practical goals. These goals include, *inter alia*, (1) an understanding of “the process by which events and actions take place.” He notes “while this does not mean that qualitative research is unconcerned with outcomes, it does emphasize that a major strength of qualitative research is in getting at the process that led to these outcomes, processes that experimental and survey research are often poor at identifying.” *Id.* at 30 (citations omitted). And (2) “[i]dentifying unanticipated phenomena and influences, and generating new, ‘grounded’ theories about the latter.” *Id.*

111. Margarete Sandelowski, *Whatever Happened to Qualitative Description?*, 23 *RES. NURSING & HEALTH* 334, 335–36 (2000).

112. KATHY CHARMAZ, *CONSTRUCTING GROUNDED THEORY: A PRACTICAL GUIDE THROUGH QUALITATIVE ANALYSIS* 45–47 (2006) (explaining the premise of theory coding, whereby the codes form elements of a theory that helps explain the data collected).

113. DEBORAH PADGETT, *QUALITATIVE METHODS IN SOCIAL WORK RESEARCH* 188–90 (2nd ed. 2008).

cases that present the “rough edges” of social experience.<sup>114</sup> We investigate parallels and differences between our study populations to illuminate the complex and dynamic elements of criminal justice systems.

Shdaimah draws on studies with women participating in Baltimore’s Specialized Prostitution Diversion Program (SPD) and Philadelphia’s Project Dawn Court (PDC).<sup>115</sup> Data are drawn from interviews and focus groups with fifty-one participants,<sup>116</sup> most of whom were interviewed between two and four times during and after their tenure in the program. The studies included over 250 hours of observation and interviews with fourteen criminal justice professionals working with the programs. These criminal justice professionals included judges, lawyers, probation officers, social workers and pretrial staff. Interviews lasted from twenty minutes to two hours, with most lasting about forty-five minutes. Focus groups lasted approximately ninety minutes. Data were collected at the respondent’s location of choice, which included homeless shelters, day and inpatient programs, non-profit agencies, courthouse rooms, coffee shops, offices, and homes. Pseudonyms, chosen by respondents, are used to protect confidentiality. More detailed information about the methods employed in this study can be found in Shdaimah’s other work.<sup>117</sup>

Corrigan’s section is based on qualitative data from interviews with 167 rape care advocates (“advocates”) working at 112 local rape crisis centers in six states across the country: Colorado, Kansas, Michigan, New Jersey, South Carolina, and Washington. Semi-structured interviews with advocates lasted from sixty minutes to four hours, with a mean of ninety minutes, and were almost entirely conducted face-to-face at the rape care program offices. In the interviews, advocates were asked to reflect on the legal response to rape in local communities. Themes were developed in conjunction with other research on police and prosecutors who process sexual assault reports.<sup>118</sup> To protect the

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114. See CHARLES L. BOSK, ALL GOD’S MISTAKES: GENETIC COUNSELING IN A PEDIATRIC HOSPITAL 17 (1992). See generally Everett C. Hughes, *Mistakes at Work*, 17 CAN. J. ECON. & POL. SCI. 320, 320 (1951) (“[O]ne man’s routine of work is made up of emergencies of other people.”).

115. For a comparison of the two programs, see Chrysanthi S. Leon & Corey Shdaimah, *JUSTifying Scrutiny: State Power in Prostitution Diversion Programs*, 16 J. POVERTY 250, 255 (2012).

116. Two of the respondents in the Baltimore diversion program were transgender women and one was male; Philadelphia’s Project Dawn Court serves only cisgender women. *Id.* at 254, 270 n.4.

117. See, e.g., Shdaimah & Bailey-Kloch, *supra* note 74, at 266–68 (reporting results of a study based on court house observations and interviews with twenty-one participants in Baltimore’s SPD); Leon & Shdaimah, *supra* note 115, at 253–56 (detailing methods and findings from their respective studies with prostitution diversion programs in three different locations).

118. See MARTIN, *supra* note 5, at 71; SCHWARTZ, *supra* note 1, at 2–3; Frohmann, *Convictability and Discordant Locales*, *supra* note 4, at 536–38; see also Lesley McMillan & Michelle Thomas, *Police Interviews of Rape Victims: Tensions and Contradictions*, in RAPE: CHALLENGING CONTEMPORARY THINKING 255 (Miranda Horvath & Jennifer Brown eds., 2009) (focusing on the complainant interview); Frohmann, *Discrediting Victims*, *supra* note 4, at 216–24;

confidentiality of interview participants, advocates are identified only by their state and sometimes a general description of their service area when such considerations are relevant to their remarks. More detailed information about the methods employed in this study can be found in Corrigan's other work.<sup>119</sup>

In the next section we describe our findings, which stand in stark contrast to explanations for criminal case outcomes suggested by ideal victim theory. Our dissatisfaction with reliance on static elements such as case facts to explain outcomes led us to develop the Arena, outlined in the previous section. In discussing our findings below, we use the Arena of Intelligibility to highlight how extrinsic constraints, intrinsic attitudes, and women's actions intersect to produce case outcomes. We argue that state determinations of women's "deservingness" of resources and recognition shed light on the complex dynamics of sex, gender, and power in criminal justice systems.

In each of the data sections below we map one woman's story through the Arena to illustrate how criminal justice professionals make sense of women and their attitudes, behaviors, and actions, thus shaping access to resources and recognition. We are deeply cognizant that any representation of women's stories relies upon our interpretive decision to highlight certain information. While our qualitative and interpretive approach may capture more depth than is possible through quantitative analysis, we do recognize that even the "thickest description" is inadequate to represent the enormous complexity and variation of human experience.<sup>120</sup> We do not by any means suggest that we can fully capture all of the factors relevant to women, criminal justice actors, or case outcomes. But we do believe that "[s]ystematic simplification is a crucial step to useful knowledge."<sup>121</sup> The themes we discuss below identify critical factors that have been heretofore insufficiently addressed by research on women's interactions with criminal justice systems.

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Lord & Rassel, *supra* note 4, at 165; Martin & Powell, *supra* note 5, at 878–79; Spohn, White & Tellis, *supra* note 9, at 183–85.

119. See, e.g., CORRIGAN, *supra* note 1, at 52–64 (explaining how the author identified rape crisis centers for inclusion in the study and discussing the method employed to preserve the confidentiality of the participants); Rose Corrigan, *The New Trial by Ordeal: Rape Kits, Police Practices, and the Unintended Effects of Policy Innovation*, LAW & SOC. INQUIRY 920, 924–28 (2013) (providing additional descriptive information about the centers involved in the study).

120. See Clifford Geertz, *Thick Description: Toward an Interpretive Theory of Culture*, in THE INTERPRETATION OF CULTURES 3–4 (1973) (providing a classic statement of this problem). King, Keohane, and Verba also point out

Even the most comprehensive description done by the best cultural interpreters with the most detailed contextual understanding will drastically simplify, reify, and reduce the reality that has been observed. Indeed, the difference between the amount of complexity in the world and that in the thickest of descriptions is still vastly larger than the difference between this thickest of descriptions and the most abstract quantitative or formal analysis.

GARY KING, ROBERT O. KEOHANE & SIDNEY VERBA, DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH 43 (1994).

121. KING, KEOHANE & VERBA, *supra* note 120, at 43.

### III. CREATING VICTIMS

Legal processing of sexual assault complainants and prostitute women produces very different outcomes. When viewed side by side, the experiences of these groups enrich ideal victim theory by drawing attention to the complicated and iterative processes through which victims earn (or are denied) legal protection and resources. In the sections that follow we highlight several distinct types of behaviors and attitudes that we have found particularly relevant in our studies of women affected by sexual crimes. Though treated separately here for the sake of analytical clarity, in practice these behaviors and attitudes are often overlapping and interwoven.

Rather than focusing on the characteristics of participants or crimes at the moment they occur, as ideal victim theory suggests, we look at how women affected by sexual crimes become intelligible to criminal justice personnel through their *responses to questioning*, *demonstrations of compliance*, and ability (or willingness) to *represent trauma* in ways consistent with law enforcement expectations. Through these practices, law enforcement officials assess women and establish criteria that affirm or deny claims to victimization and, subsequently, to legal protection. For instance, diversion programs create structures and interactions through which prostitute women are humanized, granted multiple chances for rehabilitation, and invested with legitimacy.<sup>122</sup> Sexual assault victims enter into a reporting process that is, conversely, almost impossible to navigate successfully; criminal justice personnel and processes often dehumanize victims, their cases marked as unworthy of legal action, and their claims for legal redress denied.<sup>123</sup> Importantly, we seek to show how such determinations are not preordained by women's entry point into the criminal justice process, but rather develop out of personal interactions and institutional processes that invest recognition and resources in some claimants while denying these to others.

In each of the following subsections, we present data from our respective studies that show how the practices outlined above shape responses to and case outcomes of women affected by sexual transgressions. We map the trajectory of one woman in each section to illustrate that choices about how information is elicited and interpreted can shift case trajectories in often-unexpected ways.

#### A. *Responses to Questioning*

Questioning is an inescapable aspect of interactions with criminal justice officials.<sup>124</sup> Questioning, however, can be used for multiple purposes depending

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122. See *supra* notes 69–76 and accompanying text (providing a broad overview of diversion programs for prostitute women).

123. See *infra* notes 131–35 and accompanying text.

124. See Martin & Powell, *supra* note 5, at 880–82 (explaining the many different ways in which a victim's experience is questioned by criminal justice officials).



on the motivation and intent of the official seeking information.<sup>125</sup> Questioning of prostitute women in diversion programs is often intended and experienced as caring, supportive, and humanizing,<sup>126</sup> while questioning of sexual assault victims is combative, suspicious, and aimed at uncovering the victim's own transgressions.<sup>127</sup>

Aggressive and abusive questioning by police has long been a subject of criticism by feminist and legal advocates for victims of sexual assault.<sup>128</sup> When detectives are sympathetic, they can work with victims effectively to encourage disclosure of important information.<sup>129</sup> Despite decades of education, outreach, training, and creation of specialized sex crimes units, researchers continue to document law enforcement methods of questioning that are premised on deep suspicion of rape complainants.<sup>130</sup> Advocates in all six states reported such practices to Corrigan.<sup>131</sup> Police questioning creates adversarial conditions in which victims' responses to aggressive treatment are used as evidence of their unreliability as witnesses.<sup>132</sup>

Despite some improvements, detectives who are inherently skeptical of rape victims often feel justified (indeed, duty-bound) to use threats to get victims to "come clean" and disclose the "true" circumstances of an assault or the motivations behind a rape allegation.<sup>133</sup> One advocate described this attitude as seeing the victim as "guilty until proven innocent."<sup>134</sup> Though investigating officers did sometimes employ questioning to humanize and fully understand victims, it was much more commonly used as a bullying tactic. Another advocate summed up tactics that were reported across all states involved in the study:

There are some [police officers] that absolutely do not want to believe a victim. Every victim must be lying . . . . "If they are victims, then

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125. See *infra* notes 131–35 and accompanying text.

126. See Shdaimah & Bailey-Kloch, *supra* note 74, at 264–65.

127. See *infra* note 133 and accompanying text.

128. See, e.g., James Hodgson, *Policing Sexual Violence: A Case Study of Jane Doe v. the Metropolitan Toronto Police*, in *SEXUAL VIOLENCE: POLICIES, PRACTICES, AND CHALLENGES IN THE UNITED STATES AND CANADA* 173–74 (James Hodgson & Debra Kelley eds., 2001).

129. See SPOHN & TELLIS, *supra* note 51, at 154–56.

130. Hodgson, *supra* note 128, at 173–74; Lord & Rassel, *supra* note 4, at 155–56; Shana L. Maier, *Sexual Assault Nurse Examiners' Perceptions of the Revictimization of Rape Victims*, 27 *J. INTERPERSONAL VIOLENCE* 287, 298–99 (2012); Martin & Powell, *supra* note 5, at 857–58.

131. CORRIGAN, *supra* note 1, at 74.

132. Lord & Rassel, *supra* note 4, at 155–56.

133. Schwartz goes on to note: "Much of what [police departments] called training was in fact training to interview offenders, which was adapted to interviewing victims. In other words, victims are presumed to be lying and are examined closely for evidence of this." SCHWARTZ, *supra* note 1, at 54; see also McMillan & Thomas, *supra* note 118, at 262.

134. Interview with Advocate 601, Rape Care Advocate, S.C. (Oct. 27, 2008). This same phrase was used by Spohn and Tellis to describe the attitude among some sex crimes detectives in their study of sexual assault in Los Angeles. SPOHN & TELLIS, *supra* note 51, at 159.

they must be lying because in my [many] years of experience . . . .” That’s what they will say . . . . Threatening to file charges for false reporting if their story seems at all different from what a “true” rape victim would be. “You didn’t fight, therefore, it must be that you’ve made this up. Therefore, I’ll have to file charges against you for false reporting, or even leaving children in the home with the offender.”<sup>135</sup>

Through these forms of questioning, women reporting sexual assault are often re-positioned as potential perpetrators.<sup>136</sup> The law enforcement questioning that follows a sexual assault report suggests that complainants have themselves committed illegal acts—false reporting, underage drinking, drug use, prostitution, child endangerment—that render *them*, rather than the alleged perpetrator, the appropriate subject of criminal inquiry.<sup>137</sup> The methods of questioning used in response to rape allegations thus transform some women from appealing victims to suspected criminals.

Consistent with other studies on rape reporting, advocates said that in response to such adversarial and accusatory questioning women often exhibit emotions (confusion, anger, frustration) and behaviors (resistance, evasion, talking back, lack of “cooperation”) that police interpret as inconsistent with victimization.<sup>138</sup> Police may then use such “inconsistencies” to justify unounding a report or ending an investigation. In some cases, interrogations are so abusive that complainants themselves withdraw from the process, whether by formally recanting the allegations or simply failing to cooperate in the investigation. Such actions confirm police perceptions that those complainants were not legitimate victims.<sup>139</sup> The forms and attitudes associated with law enforcement questioning thus clearly shape the responses of complainants, producing behaviors and legal outcomes rather than simply identifying ideal or non-ideal victims.

It is not far-fetched to think that, in their construction as law-breakers, prostitute women would have similar, negative experiences with criminal justice questioning.<sup>140</sup> Such histories help explain why prostitute women approach diversion programs with hesitation, initially unwilling to share their experiences due to stigma, mistrust, or fear of criminal justice consequences.<sup>141</sup> Amy had been “terrified” to appear before Judge Wallingford, rumored to be a tough judge who sent people to state prison. Her fears were allayed *because* the judge asked her intrusive questions, and Amy found herself wanting to tell her story.

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135. Interview with Advocate 317, Rape Care Advocate, Wash. (Nov. 2, 2005).

136. Martin and Powell found similar tactics among detectives in Florida. See Martin & Powell, *supra* note 5, at 881 (noting that some prosecutors administered polygraph tests to victims when determining whether to pursue the case).

137. See Kerstetter, *supra* note 5, at 297.

138. See generally SPOHN & TELLIS, *supra* note 51, at 6.

139. Kerstetter, *supra* note 5, at 281; SPOHN & TELLIS, *supra* note 51, at 115–16.

140. See generally Spohn & Tellis, *supra* note 31, at 173, 180.

141. Leon & Shdaimah, *supra* note 115, at 257–58.

Amy: [T]he first day that I had [Judge Wallingford], she was very sweet. She asked me how did I lose all of my teeth? Right in front of the whole court. And it didn't embarrass me it just showed—gave me a chance to show her—"I need your help. I need help."

Shdaimah: So that was ok that she asked that question? You didn't feel—?

Amy: No I didn't feel embarrassed. Because my teeth were knocked out by men. Dates who had turned violent. And drugs, rotting my teeth out. You know? And she wanted to know. She needed background history. And that was one thing that she got a chance to see—that gave her an opportunity to see what kind of life I had led, that my life was hard.<sup>142</sup>

Amy perceived Judge Wallingford's questioning as both an expression of caring and a necessary component to receiving effective support. Criminal justice personnel approach participants in prostitution diversion programs with the fundamental belief that prostitute women are victims; these personnel use questioning to elicit information in ways that justify prostitute women's claims to resources and recognition.<sup>143</sup> The judge pushes Amy to share in order to "reveal" and confirm in open court that victimization underlies her offending behavior, and that she therefore deserves the attendant resources and recognition that victim status entails. Amy, a savvy systems player, is attuned to the differences between suspicious interrogation and therapeutic modes of questioning. She uses the opportunity to present herself as a victim, garnering the sympathy of the court for the violent acts committed against her.

This should not suggest that questioning is always experienced as caring and supportive by women in the diversion programs. Accustomed to secrecy as a shield from legal consequences and stigma, disclosure went against Christina's self-protective instincts:

[W]hat they were telling me was "be honest. Just be honest." Because the lifestyle that I was living was a secret lifestyle. You don't tell anybody. You just keep it to yourself so people don't talk to you differently or have certain things to say to you and all of that. So it was a little difficult for me to start talking about that. But now that I have, I feel more of a person. I feel a lot better. Like there are a lot people who are interested in why people do the things that they do. I just feel a lot more comfortable with myself.<sup>144</sup>

One probation officer described prostitute women's layers of secrets as "an onion," noting that once they begin to tell their stories, the women find they have much to talk about.<sup>145</sup> Many of Shdaimah's study respondents initially resisted

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142. Interview with Amy, Participant, Project Dawn Court, Phila., Pa. (Nov. 26, 2011).

143. Leon & Shdaimah, *supra* note 115, at 256–57, 259–60.

144. Interview with Christina, Participant, Project Dawn Court, Phila., Pa. (Oct. 3, 2011).

145. Shdaimah & Wiechelt, *supra* note 74, at 157–58.

expectations (and, sometimes, coercive demands) to share their stories. However, most SPD and PDC participants eventually embraced opportunities to share when they trusted that disclosures would not be used to judge them or held against them in legal proceedings, and when they saw that these disclosures resulted in conferral of resources and recognition.<sup>146</sup> Just as they are asked to come “clean” of drugs and prostitution, women in prostitution diversion programs are asked to come clean of their secrets.<sup>147</sup> The process of “coming clean” contextualizes their experiences for criminal justice personnel, who elicit complex and sympathetic stories, often corroborating their own beliefs that women who engage in street based prostitution are victims of abuse, addiction, and limited opportunities. Women like Amy and Christina, who acquiesce to such prodding, become intelligible as victims who are responding to years of trauma with limited or maladaptive coping skills.

Questioning of sexual assault complainants may be similarly thorough and invasive, but it is more often framed as a technique to expose deceit rather than a therapeutic mode to identify the complex circumstances that underlie sexual exploitation.<sup>148</sup> Although routine in the literature on sexual assault, admonitions that complainants should “come clean” imply that they are lying or withholding information, whether related directly to the assault or not. Echoing advice given by researchers,<sup>149</sup> advocates repeatedly said that rape complainants should be frank and forthcoming in response to questioning, even when that questioning comes in a “rough,” “mean,” or “hostile” manner.

Now the detectives are going to come in and be a little more hostile, I guess, is the right word . . . . [The detectives] will come to me and say, “I think she’s lying. I’m going to get rough. Do you want to be in there?” And so sometimes I’ll sit in there and when it starts getting rough I’m like, “If you’ll just tell them the truth, you’re going to be fine . . . . If you tell them the truth now, you’re not going to be in trouble. If you let this go for two days, you’re going to be put in jail. They’re going to get you for false information.”<sup>150</sup>

Advocates understand very well that there are clear negative consequences (including legal penalties) for failing to disclose information to police, even if the direct connection to the case is tenuous.<sup>151</sup> Although full disclosure under questioning demonstrates a complainant’s willing compliance with police and is necessary for reports to move forward, complainants who *do* disclose all the information demanded of them are not always rewarded with the investment of

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146. *Id.*

147. Leon & Shdaimah, *supra* note 115, at 267–68 (explaining that most participants in their studies are guarded and skeptical of the diversion programs, but once they encounter caring individuals, participants take advantage of the therapy provided).

148. SCHWARTZ, *supra* note 1, at 5.

149. *Id.* at 56–57.

150. Interview with Advocate 602, Rape Care Advocate, S.C., (Oct. 28, 2008).

151. CORRIGAN, *supra* note 1, at 92–93.

resources and legitimacy. In fact, such disclosures can provide new reasons to question complainants' legitimacy. Advocates reported that victims who disclosed information such as a prior relationship with an alleged assailant, involvement with prostitution, underage drinking, or drug use, might see their cases pursued less vigorously or dropped.<sup>152</sup> Such information is not necessarily relevant to the case, but provides police with a more complete picture that, instead of humanizing and legitimizing the claim of victimization as occurs in prostitution diversion programs, undermines the complainant's credibility.<sup>153</sup> In their resistance to and evasion of questioning, some victims may demonstrate a clear understanding of the criminal justice system's (lack of) interest in pursuing crimes against them. Submitting to questioning may help complainants avoid criminal charges, but it does not suffice to mark them as legitimate victims in the eyes of law enforcement gatekeepers.

In Figure 3, below, we map the trajectory of Sara Reedy, a 19-year-old white woman working as a gas station attendant in Pennsylvania who was sexually

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152. Such comments were common. For example, Michigan Advocate 213 said that police often dismissed sexual assault reports as false, resulting from women "messaging around on their husband." Interview with Advocate 213, Rape Care Advocate, Mich. (Oct. 14, 2005). Washington Advocate 317 described police as utterly uninterested in investigating rape reports from women known to law enforcement because of mental illness, drug use, prostitution, or homelessness. She stated, "you may as well stamp 'victim' across their forehead because anybody can do anything [to them] and nothing's going to happen." Interview with Advocate 317, Rape Care Advocate, Wash. (Nov. 2, 2005). Michigan Advocate 221 said that women reporting sexual assault in their poor, urban jurisdiction were often assumed to be prostitutes, and that police attitudes were that "[w]e know what her trade is and what she does in her spare time, so we're not going to respond as quickly. She's used to this." Interview with Advocate 221, Rape Care Advocate, Mich. (Nov. 2, 2005). Kansas Advocate 405 described a case of a young woman beaten to death. Though her ex-boyfriend, against whom she had a restraining order, was a prime suspect, law enforcement were reluctant to move the case forward because the woman was known to have used drugs and alcohol, and to have contact with the ex-boyfriend despite the protection order. Ultimately, the Advocate concluded, "[t]he fact that she's been beaten to death is really being swept under the rug." Interview with Advocate 405, Rape Care Advocate, Kan. (Dec. 6, 2005).

153. An advocate said that police who were generally good about responding to sexual assault reports that involved white women or strangers were less likely to be interested in pursuing cases involving black women, prostitute women, or women who used drugs. She noted, "[y]ou're going to have a very different response." When asked what that response would be, the Advocate replied, "[t]hat she was asking for it." Interview with Advocate 207, Rape Care Advocate, Mich. (Sept. 8, 2005). A Colorado advocate described reviewing cases with law enforcement, stating that "the comment [by a police officer] was, 'Oh, she can't be raped, she's a whore.' Everyone laughs. I'm sitting there in amazement. The officer stopped laughing and looked at me and said, 'Oh, sorry. I forgot you were here.'" Interview with Advocate 503, Rape Care Advocate, Colo. (Sept. 3, 2008). In South Carolina, an advocate talked about trying to educate police to be compassionate when complainants do disclose connections to drugs, prostitution, or stripping. "Law enforcement's the world's worst for that [mistreatment of victims], because they despise the vice and sex industry and it shows when they respond to someone who has been raped . . . . If she's in that industry, there's very little compassion for her." Interview with Advocate 605, Rape Care Advocate, S.C. (Oct. 30, 2008).

assaulted at gunpoint by a stranger.<sup>154</sup> These initial circumstances would seem to meet the criteria for Reedy's recognition as an ideal victim, thus she enters the Arena in the upper-right quadrant (point 1), with the expectation that her case would receive both resources and recognition. She provided full, clear, and consistent accounts of the assault to a patrol officer and a forensic nurse examiner, factors which again suggest that her case would be taken seriously and investigated thoroughly (point 2).<sup>155</sup> The downward trajectory of her case begins at point 3, where, after taking Reedy's description of the assault, Detective Frank Evanson, "asked her how many times she did 'dope' each day. He then called her a liar and repeatedly accused her of stealing the money from the store."<sup>156</sup> In response to this harsh questioning Reedy began to cry; Detective Evanson "told her not to bother, 'because [your] tears aren't going to save [you] now.'"<sup>157</sup> During the forensic examination, Detective Evanson had the complainant's blood and urine tested for drugs and interpreted her use of marijuana, days before the assault, as implicating her in stealing from her employer.<sup>158</sup> In response to such questioning, Evanson said that Reedy became "verbally abusive" and, as noted in point 4, allegedly sought to drop the charges.<sup>159</sup> As a result of these interrogation techniques and the behaviors and information they produced—the positive drug test, crying, allegedly wanting to drop charges—Evanson ultimately charged Reedy with several crimes (including committing the theft herself); she was jailed for five days until the serial rapist who assaulted her was apprehended.<sup>160</sup> Ironically, Reedy's case thus ends (point 5) with resources and recognition, but the recognition is that she is a criminal, not a victim, and the resources are used to investigate and charge her for a crime.

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154. *Reedy v. Evanson*, 615 F.3d 197, 202 (3d Cir. 2010). Though the *Reedy* case was not part of Corrigan's study, the subsequent civil suits against the Township and Detective Everson provide detailed accounts, from multiple parties, about the seldom-documented practices of police interrogation of suspects. See Richard A. Leo, *Miranda's Revenge: Police Interrogation as a Confidence Game*, 30 LAW & SOC'Y REV. 259, 262 (1996) ("The interrogation room is . . . the most private social space in an American police station.").

155. *Reedy*, 615 F.3d at 204–05.

156. *Id.* at 204.

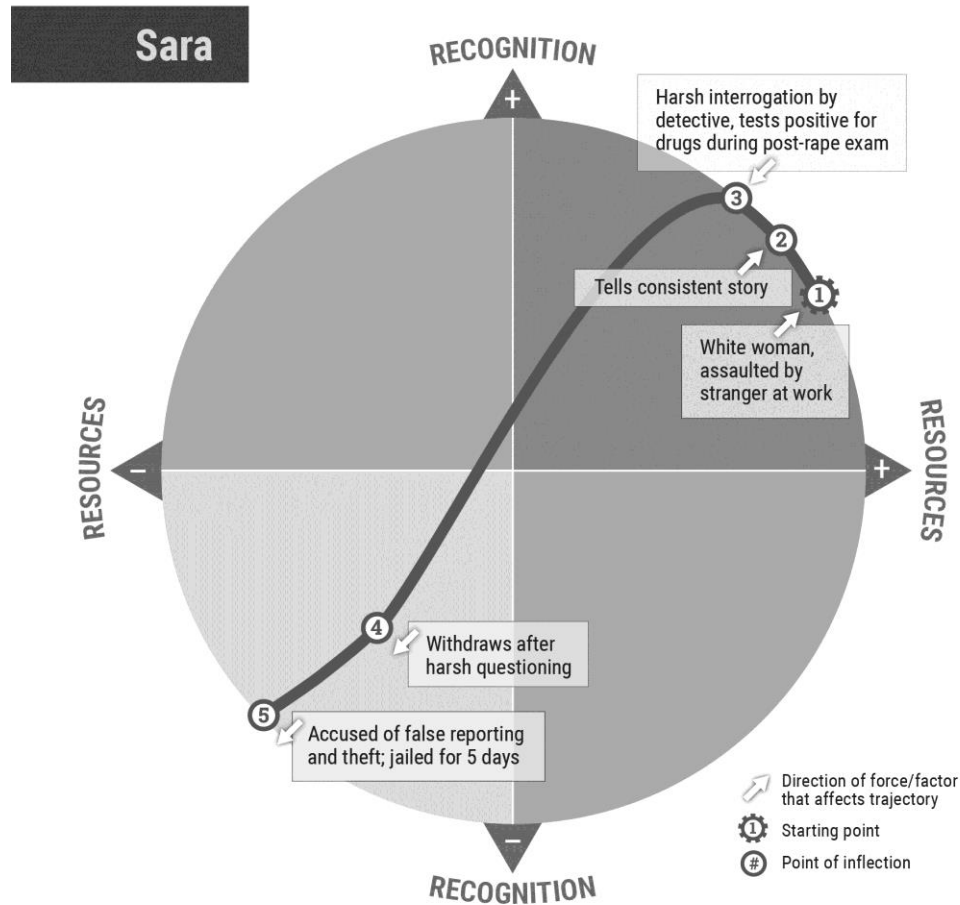
157. *Id.*

158. *Id.* at 204–05.

159. *Id.* at 206, 219 (noting that the aggressive questioning by the police officer made the victim want "the whole thing to go away").

160. *Id.* at 208–09.

FIGURE 3



Finally, it is worth noting that if close questioning is a mark of interest (whether prurient, punitive, compassionate, or disciplinary) in women involved in prostitution, one remarkable difference is how little women reporting sexual assault may be questioned at all. A nurse recounted the case of a woman who had been brought into the hospital with severe injuries including multiple fractures of the face and profuse bleeding.<sup>161</sup> Despite additional injuries

161. Interview with Nurse 312, Sexual Assault Nurse Examiner, Wash. (Oct. 27, 2005).

indicating sexual penetration, the responding officer did not believe that a sexual assault complaint was necessary. “[T]he officer came in and said, ‘Oh, I think I recognize her . . . I really think she is a street person.’”<sup>162</sup> When the nurse requested that a detective be called, the officer responded, “[Y]ou know, I don’t really think I’m going to do that.”<sup>163</sup> In this case, questioning is unnecessary because the victim is already assumed to be “known,” in ways that so thoroughly determine her identity, that even evidence of an extremely violent sexual assault may be insufficient to transform her status from a deviant outside of legal protection to a legitimate victim deserving of redress.

Questioning and monitoring behavior is not limited to interactions between legal officials and women potentially identified as victims. For example, in prostitution diversion programs, criminal justice personnel mobilize the camaraderie among participants to surveil other participants.<sup>164</sup> Participants commonly reported to the probation officer, often out of concern, women whom they saw on the streets.<sup>165</sup> Police also informally elicit information from rape care advocates to complement their formal questioning of a complainant.<sup>166</sup> Detectives sometimes turned to advocates to seek out additional information the victim may have disclosed.<sup>167</sup> An advocate described how detectives “pull me aside and say, ‘Was she on something?’ or, ‘Do you know if there was money involved?’<sup>168</sup> Because she’s got priors for being a prostitute. Did she mention that to you?”<sup>169</sup> When the official channels of fact-finding are blocked or inadequate, when women seem to have particularly incongruent identities, or when standard procedures fail to produce expected behaviors, criminal justice officials may turn to other, non-legal sources believed to have “insider” knowledge about who the woman is.

Questioning prostitute women in diversion programs provides a rich context that transmutes undesirable and illegal behavior into intelligible responses to trauma, violence, and addiction. Criminal justice personnel ask women to share their stories in the belief that underlying their illegal behavior is victimhood, and questioning is designed to elicit narratives of victimization, regret, and a desire for change. Women who respond to this type of questioning are met with resources, praise, and encouragement, all suggestive of the bestowal of resources and recognition.

The process works differently for women who report sexual violence. Though some rape care programs reported that police and prosecutors did take seriously some sexual assault complaints by non-ideal victims, disclosure of any

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162. *Id.*

163. *Id.*

164. Interview with Advocate 602, Rape Care Advocate, S.C. (Oct. 28, 2008).

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*



information that might impugn a victim often signaled the end of any real legal commitment to a case. Even when a complainant appears to be an ideal victim at the moment of the assault, questioning by police can uncover evidence of some past or predicted transgression that render her unworthy of legal protection.

### B. Demonstrations of Compliance

Compliance is one of the most important ways that women establish their intelligibility, and therefore their worth, to criminal justice actors. Compliance means different things for victims of sexual assault and for prostitute women, but both groups of women are expected to yield unhesitatingly to the demands of criminal justice gatekeepers (even though they may be expected to display situationally-appropriate resistance to other systems or individuals).<sup>170</sup> Despite that similarity, there are clear differences in how systems respond to demonstrations of noncompliance between our two groups of women. While prostitution diversion programs expect and build in accommodations for noncompliance and failure,<sup>171</sup> the sexual assault reporting process regularly treats noncompliance as undermining a rape complainant's veracity, sincerity, and commitment.<sup>172</sup>

In prostitution diversion programs, compliance is demonstrated through regular urinalysis to screen for drug use, telephone and/or in-person reporting to program staff, adherence to the rules of any community programs in which participants are placed, remaining in a designated geographic area, and reporting to court when required.<sup>173</sup> Participants waive many of their legal rights upon entrance to the programs so that treatment and other program staff who are not

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170. See Michelle Anderson, *Reviving Resistance in Rape Law*, 4 U. ILL. L. REV. 954, 980 (1998); Melanie Randell, *Sexual Assault Law, Credibility, and "Ideal Victims": Consent, Resistance, and Victim-Blaming*, 22 CAN. J. WOMEN & LAW 397, 422 (2010) (noting that the elimination of resistance requirements in rape law has not eliminated the expectations of police, prosecutors, judges, and juries that victims will demonstrate physical resistance to sexual assaults). Wendy Larcombe discusses how under cross-examination rape victims are expected to respond assertively, even aggressively, to defense questioning as a way to signal their resistance to the assault itself. Larcombe, *supra* note 48, at 142–45.

171. Leon & Shdaimah, *supra* note 115, at 258–59 (explaining that the structure of the programs accounts for some expected compliance failure. For example, Project Dawn Court employs graduated sanctions that include writing an essay or sitting in a jury box, always accompanied by forcing noncompliant participants to return to the beginning of their current program stage, which delays progress and maintains program participation); see Mueller, *supra* note 68 (recommending that sanctions for noncompliance should be tailored to the needs of the participant and circumstances of the program breach).

172. See Bryden & Lengnick, *supra* note 2, at 1224–25.

173. See Leon & Shdaimah, *supra* note 115, at 258; see also Shdaimah, *Taking a Stand*, *supra* note 75, at 98 (noting that while Baltimore's Specialized Prostitution Diversion Program is a pretrial program, similar to problem solving courts it is modeled on the principles of problem solving justice and shares features of problem-solving courts such as mandatory reporting, meetings with counselors, and drug testing).

court-affiliated may share information about them with the court, the probation officer, or the program coordinator.<sup>174</sup> This information is used to assess compliance and program breach, and thus has legal consequences.

Despite the stern warnings and threats of termination from the program, officials expect almost all participants to “backslide” as they try to break the cycles of abuse and addiction that are assumed to underlie prostitution.<sup>175</sup> “Dirty urines” that show drug use, failures to show up for court, and other program breaches are anticipated and normalized.<sup>176</sup> Such failures do not automatically incriminate women; rather, their movement within the Arena depends on their interactions with criminal justice personnel. Blue, a participant in the Baltimore SPD program, described her understanding of the program’s approach to compliance.

[I]f I had a slip, and did something, then I could go to [either of the social workers], and say, “Look, I messed up. I need more help. Can you help with that instead of putting me in jail?” And I believe she would. I don’t believe she’s just gonna say, “Okay, go to jail” because I messed up once. It’s just not the vibe that I get from her. Now, I believe if she’s got somebody that’s gonna come in there and every week, give her a dirty urine, then, yeah, she’s gonna say, “Look. Bye. That’s all I can do with you. Because nothing I’m doing is helping you.” You know? But I don’t think that she would just throw me in jail if I messed up once . . . . I get that she’s really trying to help people. And that I get that she knows, that, hey, we’re human, we’re frightened, and addiction—slips happen.<sup>177</sup>

Blue’s description highlights key elements of what determines how women are intelligible when they are noncompliant. Help-seeking responses and tying program breaches to past vulnerability and weakness in the face of addiction and trauma reinforce a narrative of victimhood. Blue does not challenge the program or the underlying criminalization of prostitution, but instead understands that a cry for help is intelligible to criminal justice personnel who will respond with assistance rather than jail time. When “slips happen,” behaviors are also assessed not only by women’s responses to them, but also within the context of participants’ life circumstances. For example, when Janet had a drug relapse after encountering a man who had raped her daughter, program staff were sympathetic and strategized about how the man might be apprehended and charged.<sup>178</sup> Staff working with Janet also sought ways to delay the application of program rules that impose sanctions for relapse.<sup>179</sup>

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174. See Leon & Shdaimah, *supra* note 115, at 258–59.

175. Shdaimah & Bailey-Kloch, *supra* note 74, at 264.

176. *Id.* at 264–65.

177. *Id.*

178. Observation, Project Dawn Court, Phila., Pa. (Feb. 22, 2012).

179. *Id.*

Similarly, Maria, whose case trajectory is illustrated in Figure 4 below, had a urine test showing recent evidence of drug use (point 1), which put her in the lower left quadrant of the Arena with little claim to resources or recognition.<sup>180</sup> When responding to Judge Kahan, Maria explained that she turned to drugs when child protective services removed her children from her care (point 2).<sup>181</sup> This response to the judge's questioning altered Maria's trajectory and put her in place to receive resources to help cope with this loss, but her spotty record of compliance kept her from receiving full recognition from the court.<sup>182</sup> Recognition of Maria as a victim began to increase only when she re-engaged with the program. Maria's demonstrations of compliance with program requirements were evidenced by renewed attendance at mandatory meetings with her therapist and probation officer and participation in outpatient drug treatment (point 3).<sup>183</sup> These behaviors put her on a trajectory toward increased recognition as well as resources, moving her into the upper right quadrant. Once there, however, her subsequent and immediate failure to attend treatment (point 4) resulted in the quick withdrawal of resources and recognition.<sup>184</sup> This trajectory is reinforced by what the program team perceived as her flippant and evasive attitude (point 5).<sup>185</sup>

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180. Observation, Project Dawn Court, Phila., Pa. (Apr. 18, 2012).

181. *Id.*

182. *Id.*

183. Observation, Project Dawn Court, Phila., Pa. (May 10, 2012).

184. Observation, Project Dawn Court, Phila., Pa. (Aug. 1, 2012); *see infra* Section III.B., Fig. 4.

185. *Id.* This assessment of Maria's behavior, as it plays out in open court, is reminiscent of descriptions of treatment courts' ongoing and, often public, assessment of clients' behaviors and perceived engagement and motivation.

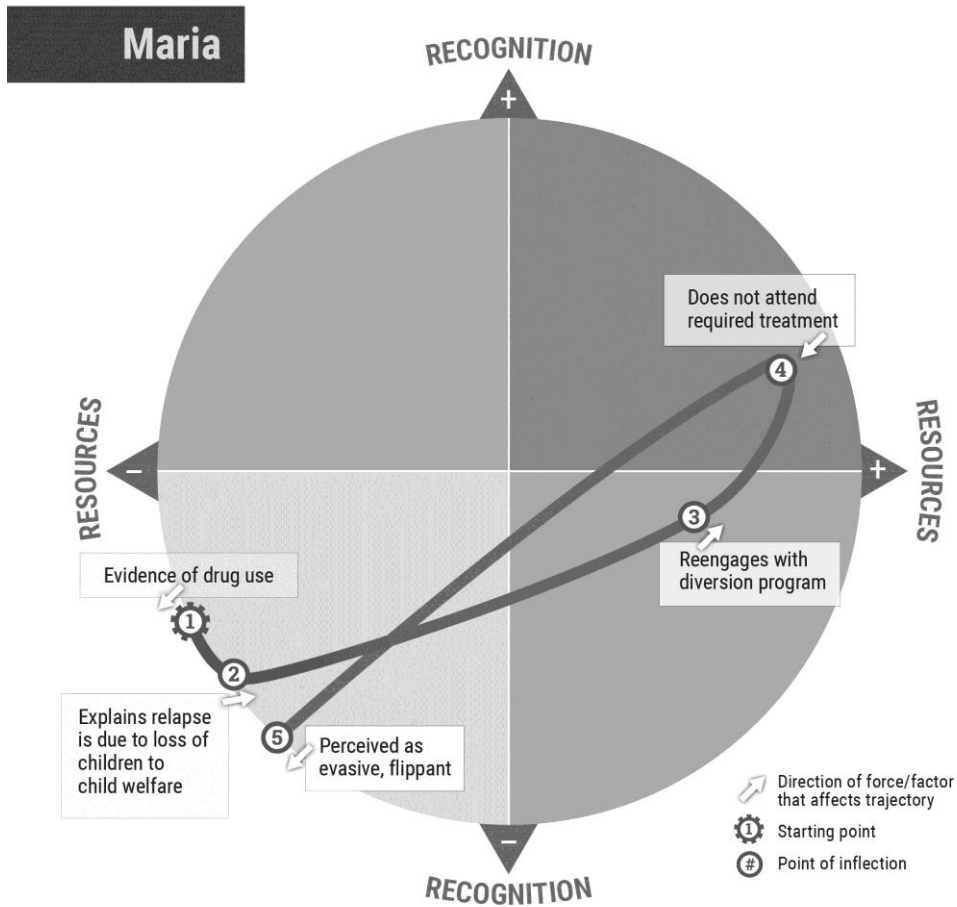


FIGURE 4

As these examples suggest, program participants are given multiple chances to redeem themselves after failure. Compliance is assessed over the duration of their participation in the program, and participants can bend their trajectory toward recognition and resources through their management of program breach and subsequent behavior. Blue understands that program participants will be judged on the perceived sincerity of their desire for help, even if they

occasionally relapse.<sup>186</sup> However, as in Maria's case, criminal justice actors may view too many breaches or behaviors "inconsistent" with expectations of victimhood as evidence that participants are disingenuous or manipulative and therefore undeserving of recognition and/or resources. Women's knowledge of what is expected is informed and shaped by the questioning, actions, and responses of criminal justice personnel, which push prostitute women's trajectory along an arc that signals their (un)deservingness of resources and recognition. For example, the drug testing components of the prostitution diversion programs anticipate and mediate relapse, providing an avenue for potential non-compliance (drug use) to be re-cast as compliance (admitting the breach and asking for help). The *act* of relapse is not itself predictive of intelligibility; rather, intelligibility is determined by criminal justice officials' *assessment* of the woman's posture in relation to the relapse and to the invocation of program rules. Similarly, police and prosecutors who request that victims sit for a polygraph are rarely interested in obtaining a truthful account of the assault; instead, the request serves as a means to test a victim's submission to those officials.<sup>187</sup>

Despite federal prohibitions on the use of polygraphs as a requirement for investigating rape cases, advocates in several states indicated that police and prosecutors still regularly ask victims to waive that legal right.<sup>188</sup> Law enforcement officials often represent the request to take a polygraph as a "friendly" request that gauges the victim's willingness to assist in the investigation:

*Advocate 1:* [Law enforcement officials will] just say, "Would you want to take a polygraph exam, just . . . so we can sort things out?"

*Advocate 2:* And sometimes victims are really willing to do that because they want to be believed. And they think that will really help.<sup>189</sup>

In responding to such requests, victims are willing participants in the process, motivated by their desire to be perceived as legitimate and truthful complainants. In other situations, police and prosecutors are less likely to request than to demand compliance; in these contexts, requests for information explicitly communicate to a victim that refusal to sit for the polygraph casts doubt upon her ability to be a good, cooperative (and therefore credible) witness. An advocate reported that law enforcement officers would say to victims, "If you are really serious, you are not going to mind if you take a polygraph test . . . . You don't have to take the polygraph test, but yet, I might not file your case,

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186. Shdaimah & Bailey-Kloch, *supra* note 74, at 264–65.

187. See generally Martin & Powell, *supra* note 5, at 881 n.89 (stating that polygraph tests are often unreliable and that police generally use these as a means to test out a victim).

188. These findings about the prevalence of polygraphing victims are consistent with studies from other states such as North Carolina and Florida. Lord & Rassel, *supra* note 4, at 165–66; Martin & Powell, *supra* note 5, at 880–82.

189. Interview with Advocate 407, Rape Care Advocate, Kan. (Sept. 26, 2008).

either, because I don't feel like I have enough evidence."<sup>190</sup> This kind of suspicion drives interview tactics that almost guarantee rape victims perform poorly in situations such as taking polygraphs.<sup>191</sup> In one interrogation, the sexual assault detective "made [the victim] take a lie detector test and he screamed at her and made her cry and all this stuff."<sup>192</sup> Police tactics thus produce new data (fear, anger, crying, and poor performance on a polygraph), which then make some outcomes (declining to investigate further) more likely than others (pursuing the allegations).

Although there is a chance that information obtained during the polygraph or forensic exam might bolster a complainant's story, these processes require victims to engage in delicate and sophisticated negotiation about whether and how they submit to law enforcement demands. Police and prosecutors may construe rape reporters as non-compliant when they represent exactly the kinds of powerlessness and trauma that prostitution diversion programs assume are normal in the lives of prostitute women. An advocate described a situation in which police repeatedly refused to take a report from "Elena," an adolescent victim:

[Elena] was a high school student and dad's best friend was continuing to rape her. [Police] did not like [Elena] . . . because two things: one, she didn't want an officer to come to the house because she'd be in trouble, she wanted them to come to the school; and because she was an immigrant. And when they moved fourteen months later, the police still hadn't interviewed her and she was still being raped. Fourteen months later. It didn't matter what we did to argue it, they didn't want to [take the report]. They wanted to follow protocol, which was to send the officer to the door.<sup>193</sup>

Despite very high rates of sexual abuse among adolescents,<sup>194</sup> this young woman was redefined through her interactions with law enforcement. A suspect immigrant identity, in conjunction with refusal to obey standard protocols, transformed her from a legitimate victim seeking police assistance into an uncooperative individual whose lack of deference to law enforcement expectations made her an unreliable witness. This ultimately resulted in the denial of resources or recognition.

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190. *Id.*

191. The myriad problems with asking sexual assault complainants to undergo a polygraph examination have long been evident to practitioners. See, e.g., JOANNE ARCHAMBAULT & KIM LONSWAY, VAWA 2005 RESTRICTS THE USE OF POLYGRAPHS WITH VICTIMS OF SEXUAL ASSAULT 1, 3 (2006), <http://www.ncdsv.org/images/vawapolygraphpromising%20practices.pdf>.

192. Interview with Advocate 309, Rape Care Advocate, Wash. (Oct. 19, 2005).

193. Interview with Advocate 317, Rape Care Advocate, Wash. (Nov. 2, 2005).

194. The National Violence Against Women survey found that 32.4 percent of women who experienced sexual victimization were between ages twelve and seventeen at the time of the assault. PATRICIA TJADEN & NANCY THOENNES, EXTENT, NATURE, AND CONSEQUENCES OF RAPE VICTIMIZATION: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 18 (2006), <https://www.ncjrs.gov/pdffiles1/nij/210346.pdf>.

Where legal officials assume that women affected by prostitution will have complicated lives that demand flexibility and special accommodation, rape complainants are given far fewer opportunities to explain or contextualize their concerns around reporting sexual assault.<sup>195</sup> The institutional practices of the diversion programs anticipate and normalize resistance as a logical consequence of disclosing painful experiences; these behaviors thus do not render women unintelligible nor disqualify them from legal protection.<sup>196</sup> In contrast, rape complainants who hesitate or balk at any moment in the reporting or investigatory process for any reason may be deemed non-compliant.<sup>197</sup> Regardless of the circumstances of the victim, assailant, or assault, concerns about or delays in reporting, inconsistency in affect or narrative, requests for accommodation, inquiries about legal rights, or the appearance of adversarial attitudes toward police or prosecutors are signals that a victim is unwilling to hand herself over entirely to the direction of law enforcement, and therefore she may fail to meet the (unstated) criteria for credible and worthy victimhood.

### C. Representing Trauma

While non-compliance is an important marker of intelligibility, real victims are also expected to offer meaningful and appropriate presentations of trauma. Demonstrations of trauma themselves are insufficient to mark women as worthy victims; trauma must be presented and experienced in ways that coincide with law enforcement expectations. Some expressions of trauma reinforce the legitimacy of victim claims while others incriminate women as undeserving.

Advocates discussed a number of cases in which police and prosecutors did take seriously non-stereotypical rape victims, such as women involved with prostitution or gay men assaulted by an acquaintance. However, when the cases of such victims did move forward, they were often characterized by very high levels of serious physical violence that almost certainly endowed those claimants with a level of intelligibility they may not have had otherwise.

In rural Colorado, an advocate described the surprising case trajectory of “Lois,” a woman known to the community and local police as a severe alcoholic.<sup>198</sup> As Figure 5 indicates, these sociodemographic characteristics suggest that Lois should have very low expectations of seeing her case taken seriously or moved forward by law enforcement officials (point 1). Despite her checkered reputation, police were shocked into action when Lois was brutally

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195. See Alderden & Ullman, *supra* note 1, at 527 (“Not only does research indicate that officers are wary about sexual assault claims in general, but that concerns of victim truthfulness have been found to affect actual police determinations of case legitimacy.”).

196. Shdaimah & Bailey-Kloch, *supra* note 74, at 258, 264–67 (describing participants’ experiences with and insights regarding Baltimore’s Specialized Prostitution Diversion Program).

197. See Archambault & Lonsway, *supra* note 191, at 1–2 (noting that during the screening process of sexual assault complaints, certain victim behavior, such as failure to follow through or participate and uncertainty about the details of the assault, are considered “red flags”).

198. Interview with Advocate 506, Rape Care Advocate, Colo. (Sept. 5, 2008).

assaulted by a stranger who had hidden in her vehicle (point 2). Her case was initially accorded both resources and recognition; however, as point 3 indicates, the lack of an immediately identifiable assailant undercut the ability of police to commit resources to the investigation, even as they unhesitatingly recognized Lois's status as a victim. The investigating officer for example, "treated her like a person, with respect, with kindness," and at a meeting to discuss the case several weeks later, one of the police officers who had been first to respond to the scene began talking.<sup>199</sup> "He broke down and was just sobbing."<sup>200</sup> The overwhelmingly violent nature of the assault ultimately produced a sustained commitment to the case from police and prosecutors, resulting in an all-out investigation that drew on the resources of several local law enforcement jurisdictions. Eventually, as represented by point 5, a suspect was apprehended and tried for the assault—an unlikely outcome given Lois's initial status as a less than ideal victim.

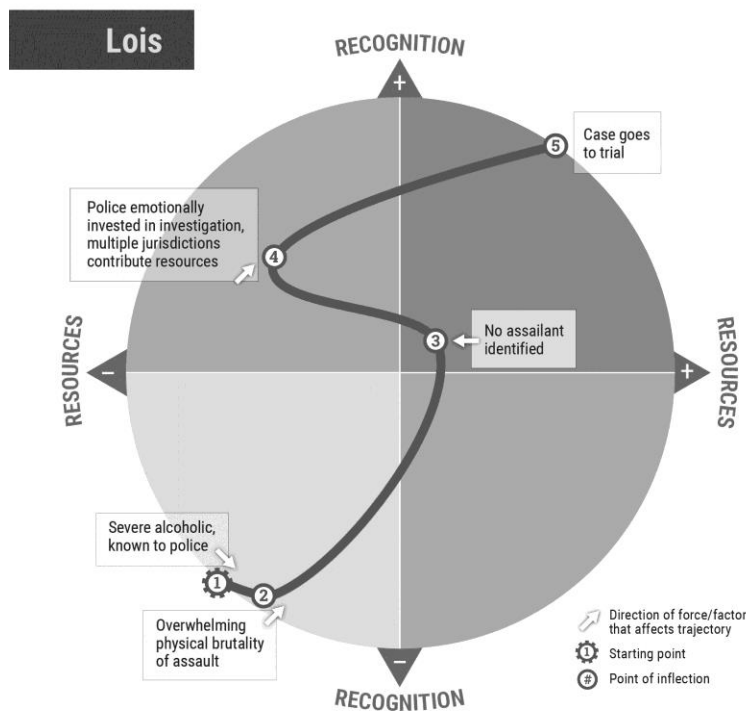


FIGURE 5

199. *Id.*

200. *Id.*



Thus, like prostitute women, rape complainants may be transmuted into deserving victims as a result of their presentations of trauma, especially the results of physical brutality. Such cases, though relatively uncommon, are consistent with other research indicating that occasionally unappealing or unsavory complainants may be reclassified from a non-credible victim and suspected “offender” into a legitimate victim rewarded with the investment of investigative and/or prosecutorial resources.<sup>201</sup>

However, law enforcement officials do not interpret evidence of sexual violence trauma consistently, even if that trauma is physical and tangible. Clear proof of physical injury is not sufficient to render a rape complainant intelligible; rather, such information must be weighed in conjunction with other characteristics or actions. Advocates provided numerous examples. A prosecutor in one jurisdiction refused to file charges in most sexual assault cases, especially (though not only) if “the person . . . [was] drinking or [a] prostitute or whatever, even if there is serious injuries it’s not going to be prosecuted.”<sup>202</sup> Despite a rape report that included documentation of “several severe injuries,” police “did not follow up with the accused offender for six days” because the offender was an individual known to the complainant.<sup>203</sup> A woman who had been drinking with two men was taken to a wooded area, raped, and severely beaten. When the advocate met with her, the victim was “still bruised, [with marks on her neck from attempted] strangulation . . . . And we had a law enforcement officer that questioned whether this was consensual or not because she was drinking.”<sup>204</sup>

In prostitution diversion programs, physical appearance is an outward manifestation of trauma that allows court staff to identify and classify participants.<sup>205</sup> Women come into the programs in varying physical states. New program participants commonly appear agitated, tapping legs and arms and looking around nervously in ways that indicate drug addiction or withdrawal.<sup>206</sup> Some have trouble getting through a long court day, with hours of waiting in court until their case is called or to meet with staff.<sup>207</sup> Some women appear to be under the influence of drugs, experiencing withdrawal symptoms, taking medication (such as methadone) to aid in their recovery, nodding off, closing their eyes while talking, or sleeping through loud noises.<sup>208</sup> Shdaimah observed a drug assessor send someone home who was so soundly asleep in the waiting room that he practically shouted her name and touched her lightly before she

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201. See generally Frohmann, *Hard Cases*, *supra* note 15.

202. Interview with Advocate 218, Rape Care Advocate, Mich. (Sept. 21, 2005).

203. Interview with Advocate 406, Rape Care Advocate, Kan. (Dec. 6, 2005).

204. Interview with Advocate 213, Rape Care Advocate, Mich. (Sept. 14, 2005).

205. See Shdaimah, *supra* note 75, at 109–10.

206. Observation, Project Dawn Court, Phila., Pa. (2011–2014); Observation, Specialized Prostitution Diversion Program, Balt., Md. (2010–2011).

207. *Id.*

208. *Id.*

opened her eyes, oriented herself with some difficulty, and responded.<sup>209</sup> Consistent with the diversion court tolerance for “slips,” he simply asked her to come back next week to complete the assessment when she was more fully rested and able to answer questions. These physical manifestations of illness, trauma, and addiction serve as indicators of victimization, and thus are initially intelligible in the context of prostitution diversion programs aimed at addressing the perceived underlying causes that lead to offending.

As women move through the program, their “progress,” manifested through their appearance and health, is interpreted and noted through the lens of victimization. Criminal justice personnel and program participants discuss withdrawal and recovery from addiction, improvements in physical and mental health, management of chronic illness, and signs of improved hygiene and self-care.<sup>210</sup> Program staff and participants frequently make comments regarding appearance. Weight gain, improved hygiene, “appropriate” attire, and mental alertness are signs of progress; deterioration in outward appearance shows a lack of concern for self or societal norms and is evidence of ongoing relapse and unaddressed trauma. Program staff commend the appearance of participants who are doing well, reminding them of what they looked like when they first came entered the program. In the PDC, program staff sometimes pass around arrest photographs, asking all those present in the courtroom to compare these images with the current appearance of successful participants. These photographs are also shown to participants themselves, who are asked before the court whether they see the change that we, as outsiders, claim to see in their physical appearance.

Problem-solving programs such as those in Baltimore and Philadelphia are premised in part on the assumption that individuals engage in illegal behavior because of underlying problems, particularly histories of abuse and addiction.<sup>211</sup> This assumption is reinforced by much of the scholarly literature, as well as public discourse around trafficking for purposes of sexual exploitation,<sup>212</sup> that

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209. Observations in waiting area, Specialized Prostitution Diversion Program, Balt., Md. (Aug. 23, 2010).

210. Therapists, probation staff, attorneys, and program participants provide updates in open court on each Project Dawn Court participant. In the Specialized Prostitution Diversion Program, participants consent to reports of attendance and compliance with therapeutic programs.

211. See Leon & Shdaimah, *supra* note 115, at 257.

212. The focus of sexual trafficking discourse on victimization has been critiqued for ignoring social and economic forces contributing to trafficking and to decisions to engage in sex work. See Hoyle, Bosworth & Dempsey, *supra* note 86, at 319–21; Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the “Native” Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1, 20 (2002) (noting that women who voluntarily migrate are often considered victims of trafficking). Depictions of trafficking victims highlight sexual exploitation, largely ignoring trafficking for other purposes such as domestic and agriculture labor. O’Brien, *supra* note 86, at 318–19. The wholesale conflation of all sex work as trafficking has also been critiqued as failing to acknowledge that women can and do choose to engage in prostitution and other forms of sex work. See BERNSTEIN, *supra* note 57, at 33–34. Even when women make this choice under constrained circumstances, it is not clear that sex work is inherently *worse* than any

describes women who engage in street-based prostitution as victims of sexual assault and other forms of abuse. While many program participants interviewed by Shdaimah confirm that abuse is in fact a significant part of both their history and current situation, they view factors such as poverty and limited educational opportunities as equally salient. Although diversion program staff acknowledge that prostitution, intractable addiction, and chronic health problems are associated with poverty and limited employment opportunities, the staff is more likely to view sexual exploitation as the underlying cause for all other problems and obstacles these women face.<sup>213</sup> Regardless of the source, such experiences are assumed to leave deep marks of physical and emotional trauma on diversion program participants.

In Project Dawn Court, trauma treatment is compulsory. Denial of traumatic experiences is met with skepticism, and is usually construed as either a failure to recognize experiences as traumatic or a refusal to disclose. Program staff push participants to acknowledge trauma. When Ava denied experiencing sexual trauma, a probation supervisor accused her of being “evasive” and “dishonest.”

He got very aggressive with me and because I wasn't—they termed it—I was being evasive or dishonest,” because I said I wasn't sexually traumatized. Well, I said to him, “You remind me of one of the guys who used to pick me up on the Avenue.” . . . Then I spoke with [my probation officer] Catherine alone and I did self-disclose some things. But he was just standing over me and was very aggressive. So I was a little verbally abusive to him and said some things I shouldn't have. But I just felt like I was being abused all over again. So that was my introduction of my first time reporting . . . . It was horrible. I was in tears, I was crying hysterically 'cause I just felt like, “Why do they have this person in this position working with traumatized women if he's going to be like, [in an accusatory tone] “Well you have to have some sexual trauma in your history.”<sup>214</sup>

Trying to understand what she perceived as aggressive demands to acknowledge trauma, Ava speculated that it may have been prompted by other participants' dishonesty: “I was told maybe [others] in the program . . . lied or manipulated and maybe he was trying to weed me out.”<sup>215</sup> Even though program staff expect trauma, they also expect manipulation and deceit from women for whom lying is viewed as a necessary survival skill.

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other form of exploitive, low-wage labor. See Shdaimah & Leon, *supra* note 66, at 327 (finding in the alternative that sex work can be a rational economic choice among women with extremely limited legal employment opportunities).

213. Interview with Program Staff, Specialized Prostitution Diversion Program, Balt., Md. (Nov. 19, 2011).

214. Interview with Ava, Participant, Project Dawn Court, Phila., Pa. (Aug. 10, 2013).

215. *Id.*

Both diversion programs view therapeutic exploration of trauma as a crucial step to develop coping mechanisms that replace self-medication through drugs and alcohol or low self-esteem that they believe underlie women's behavior. The following court observation reveals the persistent subtext that encourages women to disclose and "process" traumas. The judge acknowledges, but refuses to be persuaded by, Darlene's reticence to attend counseling.

Darlene comes up. Sara, who graduated nearly a year before and now works at the house for trafficked and prostitute women where Darlene lives, reports on Darlene's progress. Judge Kahan says "You know what I'm going say. [Darlene] needs a little push to go to [trauma counseling]." The judge then says to Darlene: "I see those eyes [rolling]." <sup>216</sup>

Program staff cajole reluctant participants like Darlene to participate in required therapy; her resistance is contrasted with the attitudes of participants like Jean who recognize their need for therapeutic interventions. After a program breach, Jean expressed to Judge Kahan her desire to get into the therapy program:

My need to use is stronger than my need for safety. I'm struggling. I need help. I get scared and I get caught up so quickly. Look at me, I'm emaciated. I don't know what to say . . . . I have no words. I don't know what to say. I'm going to die out there. <sup>217</sup>

The emotional trauma that is expected of prostitute women presents an entirely different set of complications when evidenced in sexual assault cases. Whereas prostitute women are assumed to have long histories of abuse that explain their current circumstances, women who report sexual violence are blamed for the very qualities and characteristics that increase their vulnerability to assault. Even serious reports were often reduced to very minor charges: "some of them I see getting bumped down, the victim may have reported a few times in the past, so that would be held against her." <sup>218</sup> Another advocate who did outreach to homeless teenagers through local shelters found that both teens and shelter staff had learned that police were uninterested in taking reports from this population. According to the advocate, "[t]hey say they try to report things to the police and it's not believed, so why bother? . . . [T]he feedback I get from the shelters is that they won't even go to the police." <sup>219</sup> Past histories of trauma among rape victims leads to suspicion and incrimination, rather than an understanding of how factors such as youth, sexual abuse, drug use, and/or homelessness put individuals at greater risk for victimization.

Trauma also complicates rape reporting. The requirement for demonstrating "appropriate" affect is a difficult line to walk. <sup>220</sup> Affective intelligibility requires

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216. Observation, Project Dawn Court, Phila., Pa. (Apr. 9, 2013).

217. *Id.*

218. Interview with Advocate 319, Rape Care Advocate, Wash. (Nov. 3, 2005).

219. Interview with Advocate 314, Rape Care Advocate, Wash. (Oct. 28, 2005).

220. See generally SCHWARTZ, *supra* note 1, at 10.

that victims display both externally visible trauma and a high level of cognitive functioning: they should be sufficiently traumatized to be sympathetic and convincing, but not so traumatized they are unable to fulfill their role as a witness to the assault. Expressions of fear, shock, horror, disgust, shame, and other emotions signal to legal and medical officials that a victim is reacting properly. However, if any of these are present in ways that seem inappropriate, then victims become suspect.

A clear, accurate, and consistent statement of events is critical to establishing the credibility of a victim.<sup>221</sup> Yet complainants who are seen as detached, coherent, or self-contained, instead of visibly distraught, are also suspect.<sup>222</sup> When interviewing Sara Reedy, the young woman discussed in Section III(A) who was sexually assaulted and robbed while working at a gas station, Detective Evanson

found it suspicious that Reedy had reported that the crime happened around 10:40 p.m. and that the cash register had been opened at exactly that time. In his view, “nobody that’s in this kind of a hysteria would know exactly what time it was, so she had to have preplanned this because nobody would know this.”<sup>223</sup>

Overly emotional presentations of trauma raise different suspicions. For some criminal justice personnel, a victim who cries during the interview is intelligible as a genuinely traumatized individual, whose status in the Arena is moved toward recognition. But when criminal justice personnel suspect victims of fabricating assaults, crying or other emotional displays may be read as an attempt at avoidance, manipulation, and deception.<sup>224</sup> Recall that during one interrogation of Sara Reedy, described above, Detective Evanson accused her of manufacturing tears in an attempt to divert attention from her own alleged theft.<sup>225</sup> Police also express impatience with displays of emotion; expressions of trauma can be described with impatience as delaying the investigation.<sup>226</sup>

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221. *Id.* at 17–19; McMillan & Thomas, *supra* note 118, at 263.

222. A South Carolina advocate reported that police will say as evidence of “deceit” that victims appeared to be insufficiently upset, with statements such as “[s]he wasn’t crying whenever she told me about this.” Interview with Advocate 613, Rape Care Advocate, S.C. (Nov. 7, 2008).

223. *Reedy v. Evanson*, 615 F.3d 197, 206 (3d Cir. 2010). And yet police often express disbelief and frustration when victims are not able to provide this level of detail and specificity, frustration that may be perceived by complainants (often correctly) as expressing doubts about the truthfulness of their account. See McMillan & Thomas, *supra* note 118, at 268–73.

224. *SPOHN & TELLIS*, *supra* note 51, at 159–61; McMillan & Thomas, *supra* note 118, at 264–65.

225. *Reedy*, 615 F.3d at 204.

226. In South Carolina, an advocate talked about training police on the services offered by the rape care program. She described police as pleased that advocates would do the emotional labor of dealing with victims: “[T]hey said, ‘[w]hen them girls are crying, you’re going to sit and hold their hand and I can go investigate?’ . . . They saw a way to get out of it [dealing with complainants’ emotions] . . . They leave us and they can start an investigation.” Interview with Advocate 602, Rape Care Advocate, S.C. (Oct. 28, 2008). By contrast, a New Jersey advocate said that police resented the presence of advocates during questioning, with police saying that advocates “make

Emotional displays thus must be sincere to garner sympathy without engendering suspicion or interfering with the work of law enforcement, lest they produce the withdrawal of recognition.

Complainants who embody physical and emotional trauma in ways that are comprehensible to officials may be viewed as sympathetic and credible, while those whose harms are less visible or legible are suspected of invoking trauma as a form of manipulation.<sup>227</sup> Prostitute women often enter the criminal justice system with markers of harm evident on their bodies; recovery from physical ailments is a sign that emotional trauma is being acknowledged, processed, and treated effectively. Participants are expected to maintain a constant trajectory of improvement, demonstrating their compliance with therapy and desire for rehabilitation. Rape complainants are expected to produce a body on which the physical injuries sustained in an assault are absolutely clear evidence of physically brutality.<sup>228</sup> When injuries illuminate a longer history of abuse, addiction, or poverty, rape complainants have a more difficult time showing the trauma of a single event.<sup>229</sup> Although not impossible, the levels of physical trauma necessary to incontrovertibly prove sexual violence are weighed in conjunction with previous behaviors. Emotional trauma poses a more complicated set of expectations in which victims must present as both emotionally devastated and yet not mentally impaired, helpless in the face of trauma and yet possessed of sufficient cognitive resources to cooperate in the investigation.

#### *D. Why (and How) Intelligibility Matters*

Contestation over intelligibility has real consequences for women and the legitimacy of their claims on the state. We illustrate these important consequences by returning to Linda, the woman whose story opened this Article. The actual outcome of this case, which is almost impossible to explain using existing theories about ideal victims, returns us to our initial examination of how legal processes differently affect women reporting sexual assault and those involved in prostitution diversion programs.

Brigit, a social worker, informed the prosecutor that Linda, a successful graduate of the Baltimore SPD, complained of a police officer who coerced her into sex and then tried to set her up on a prostitution charge.<sup>230</sup> Brigit met with

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[complainants] comfortable, and you make it very easy for them to lie [to the investigator].” Interview with Advocate 105, Rape Care Advocate, N.J. (Oct. 18, 2001).

227. See Bryden & Lengnick, *supra* note 2, at 1201–04.

228. Bryden & Lengnick, *supra* note 2, at 1202 (“[B]y inflicting some serious additional physical injury on the woman, the public generally abhors the crime and sympathizes with the woman.”).

229. See generally Jacobson, *supra* note 19, at 1026, 1028.

230. This came up during Shdaimah’s interview with Brigit when the prosecutor came into Brigit’s office seeking to follow up on their discussion of Linda’s case. Interview with Brigit, Participant, Specialized Prostitution Diversion Program, Balt., Md. (March 12, 2012).

the prosecutor to determine Linda's possible courses of action. Brigit reported that "[Linda] not only has the clothes with the semen on it, but she has the money that he threw at her with his fingerprints on it and she is hell-bent. And I said before we just jump in . . . let's make a plan."<sup>231</sup>

If Linda had gone to the hospital and alleged that she had been assaulted by a police officer, Corrigan's data suggest that it is extremely unlikely that such a report would have been taken seriously or warranted further investigation. In predicting Linda's trajectory through the Arena without accounting for her participation in the SPD, her behaviors and history would likely place her in the lower left quadrant, worthy of neither resources nor recognition. During police questioning, Linda might try to hide her work as a prostitute, probably having learned from previous encounters with police, human services, and non-profit agencies that such disclosures would almost certainly close doors, rather than open an investigation. Even if she disclosed that information and was willing to undergo a post-rape forensic examination or a polygraph, as a woman with a history of prostitution and therefore presumed to be a drug addict, Linda almost certainly would not be viewed as a credible complainant. Moreover, her angry emotional presentation might be suspect: being "hell-bent" on pursuing the case would likely be interpreted as a prostitute seeking vengeance against a police officer who was simply doing his job.<sup>232</sup> The socioeconomic differences between Linda and the alleged assailant would further diminish the likelihood of investigation and might even subject her to police intimidation and/or harassment.

As we saw in Figure 2 and replicated below, in Figure 6, Linda's *expected* outcome as a known African American prostitute woman claiming to have been sexually assaulted by a police officer (point 3e) is not her *actual* outcome. In Figure 6, below, we have inserted the points of inflection to illustrate Linda's trajectory to this actual outcome (here labeled as point 6). Despite Linda's personal and criminal history and the circumstances of the assault (point 2), we see her case follow a very different trajectory than most theories of case outcomes could predict or explain. At the new point 3, rather than the case being dropped, Linda reaches out to her criminal justice allies, Brigit and the

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231. *Id.*

232. In their study of sexual assault case processing in Los Angeles, Spohn and Tellis note the prevalence of the "vindictive victim" narrative among detectives who believed that complainants were making false reports. These investigators "emphasized that teen and adult females make false allegations either to cover up for their whereabouts, because of mental health issues, or for revenge." SPOHN & TELLIS, *supra* note 51, at 238-41. Particularly relevant for our discussion of Linda are the comments of one detective:

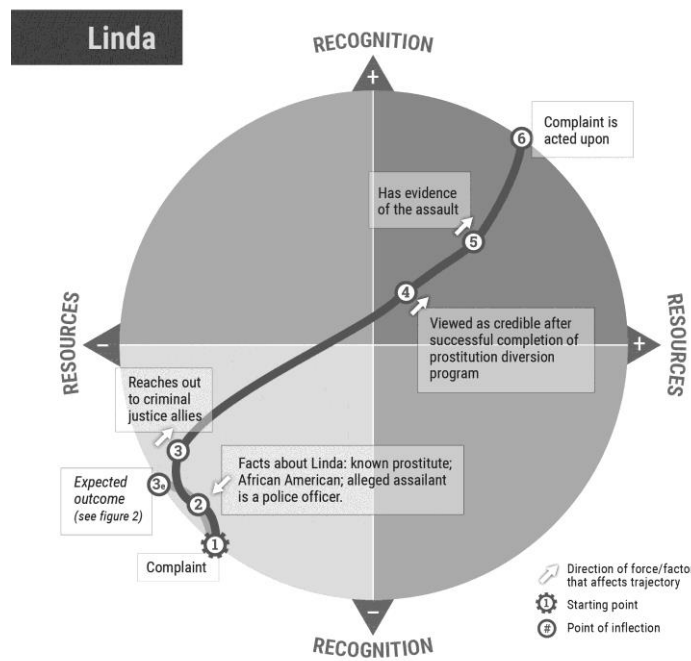
In my area, the majority of the victims are prostitutes. Initially they will deny the prostitution, which I won't ask them about until the end of the interview and at that time they typically get very defensive. Saying rape is a way of empowering themselves because they are being abused. It is a way for them to exert power and show the suspect that they can ruin his life even though she is only a prostitute.

*Id.* at 239.

prosecutor, putting her on a trajectory toward greater resources and recognition. Linda has learned that her disclosures of abuse will be believed, and that honesty about who she is will be rewarded with understanding and compassionate action. As a graduate of the SPD, Linda is invested with credibility and legitimacy (point 4); as a rape complainant, she has achieved the credibility some women are initially awarded by virtue of their sociodemographic characteristics or circumstances of the assault. In this context, her “hell-bent” disposition and calculated retention of incriminating evidence (point 5) are understood as logical behaviors and actions inspired by the righteous anger of a citizen betrayed by a public official, rather than as a prostitute’s pursuit of a personal vendetta. Linda’s claims are recognized and validated by powerful allies in the criminal justice system; she is known and intelligible to legal insiders, such as Brigit, who then include themselves on the team that will help make a plan and mobilize prosecutorial resources to address the assault. Each of these points marks progress on her trajectory toward recognition and resources, culminating in action on the reported assault (point 6).

FIGURE 6

Linda’s report is taken seriously, but only because she has earned access to legal protection based on compliance with an intrusive and coercive program.



Linda’s peers still on the street have little chance of being taken seriously if they



were to report the same crime, even if they were identical to Linda in age, race, history of arrest and/or drug use, and assault situation. Even if Linda were not involved in prostitution, law enforcement practices would likely uncover some previous behavior, provoke some angry response, or identify some aspect of the assault that would cast doubt upon her truthfulness and reliability. As an SPD participant, greater knowledge about Linda makes her more human, more credible, and more believable, contrary to discourse about prostitute women as inherently non-ideal victims.<sup>233</sup>

If Linda were to encounter criminal justice officials primarily in the role as a rape victim, the likelihood that some flaw in her or her story would be found increases significantly, and her case is much more likely to follow the expected outcome (3e) indicated in Figure 6. As a rape victim, Linda occupies a precarious location from which she might become a powerful symbol of sexual victimization and a police officer's abuse of power, but it is more likely that she might fail to meet some standard for credibility and thus would be denied redress. The more we know about Linda's status as a rape victim, the less likely it seems that she will achieve the quixotic balance of unblemished character, complete helplessness, total resistance, and perfect compliance expected of rape complainants.

Despite a certain amount of fluidity, discursive, dynamic, and iterative criminal justice processes produce lasting outcomes. Women implicated in sex crimes are rewarded with or denied resources and recognition, their claims about victimization legitimized or denied by state actors.<sup>234</sup> Such decisions can have significant and lasting effects on women's lives, including their access to criminal justice resources in the future.<sup>235</sup> Criminal justice actors' formal and informal decisions about women affected by sexual offenses become part of the knowledge generated about them, creating institutional memories that can be difficult to change or overcome. An advocate in Corrigan's study talked about how difficult it was for some women to be treated fairly based on preexisting legal "knowledge" about who she "is":

I recently had a person in my caseload who was a prostitute and was a drug user and she had cleaned herself up . . . . Here she is working in a part-time position and she says, "Law enforcement walks into where I am working and they are saying to my manager, 'Oh, you've got to look out for her. You've got to watch this one.'" She comes back to me and says, "How is that fair? I haven't been picked up by them lately. I haven't done anything and they came in and said to my

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233. Jacobs, *supra* note 81, at 460–61, 463; Balos & Fellows, *supra* note 4, at 1224–25, 1261; Larcombe, *supra* note 48, at 140, 142. This further illustrates Wendy Larcombe's argument that "non-ideal victims" may possess skills, attitudes, and resources that actually make them more effective *witnesses*, even if they may be less inherently appealing *victims*. Larcombe, *supra* note 48, at 142–45.

234. SPOHN & TELLIS, *supra* note 51, at 115–16.

235. *Id.*

supervisor, ‘You better watch her.’” It’s hard to break out of that if it’s an entire system and society that keeps you trapped there.<sup>236</sup>

Although these assessments are dynamic, women’s identities can be solidified through formal case outcomes (e.g., conviction, expungement) and informal status ascription (e.g., troublemakers, liars, helpful, clean). Outcomes and knowledge are transmitted across the legal networks through which women’s experiences are circulated and defined. Previous interactions with the criminal justice system shape interpretations of intelligibility when women encounter police again, whether through a bust for prostitution, making a report as a rape victim, or simply seeing each other in the neighborhood.

#### IV. CONCLUSION

This Article points to new areas for study and intervention that examine the profound implications of decisions whether to recognize women’s claims about victimization.

First, the dynamic, interactive, iterative, and interpersonal processes that shape criminal justice outcomes point to the clear need for additional research in this area. The qualitative studies that have inspired us provide important insights, but too often they focus on just one criminal justice system participant or perspective, such as police, or prosecutors, or defense attorneys. Our model, the Arena of Intelligibility, suggests that a longitudinal approach that follows claimants, rather than criminal justice personnel, would more effectively capture the multiple decision points that shape determinations of intelligibility. Such an approach would bring greater attention to the ways that the individual preferences of criminal justice actors intersect with institutional considerations in actively molding and moving some cases toward recognition and resources, while others are diverted away. Our model also points to the need to examine a wider variety of factors, individually and in interaction, to more fully understand and explain decision-making and case outcomes. The more nuanced analysis that our model provides will better align theory and practice so that existing theories may be amended to more effectively capture and describe the processes and actions that they seek to explain. These intellectually richer and more descriptively accurate theories will highlight the assumptions under which criminal justice institutions and personnel operate so that they may be more fully investigated by scholars, understood by implementing personnel, and debated by policymakers and a more informed public.

One very important area that our research brings to light are heretofore unexamined areas of bias beyond those related to observable case facts or demographic characteristics of victims. Though policies and programs directed at women affected by sexual transgressions are facially neutral, it is clear from our research that criminal justice responses are significantly shaped by expectations about how women present themselves, their relationships, and their

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236. Interview with Advocate 603, Rape Care Advocate, S.C. (Oct. 28, 2008).

trauma and vulnerability to criminal justice decision makers. Feminist and social science researchers have examined how domestic violence policies rely on problematic assumptions and produce deeply troubling consequences;<sup>237</sup> such research has inspired activists, scholars, policymakers, and law enforcement officials to change laws and practices. So too should more data grounded in *actual* practices regarding women involved in sexual transgressions lead to changes in practices, programs, and policy. Ideal victim theory and quantitative models predicting case outcomes do expose certain types of biases. However, these models lack the capacity to identify the dynamic and interactive nature of such biases or to trace how attitudes and practices shift over time to reflect changes in cultural, institutional, and personal priorities.

It is clear that biases and assumptions about women, gender, and sexuality predispose criminal justice personnel to dismiss sexual assault claims made by certain women, regardless of or in combination with race, class, and education. They also predispose these actors to discount both the narratives and the self-determination of women engaged in prostitution when these do not comport with expectations regarding attitudes and behaviors of women who are deemed sexually exploited. The practices that we have uncovered are also important because they have implications for actual and perceived understanding of justice and access to justice. If women hesitate to seek help from the criminal justice system, or if they are dissuaded from presenting themselves in certain ways, the criminal justice system will fail to adequately and fairly address the real problems that make women vulnerable.

It seems unlikely that Linda would have filed a sexual assault complaint had she not graduated from the SPD, as many prostitute women “know” that criminal justice personnel are not responsive (and often hostile) to their claims and therefore do not report even very serious crimes against them.<sup>238</sup> Linda’s relationship with criminal justice personnel in the SPD and the credibility established by her graduation “signaled” to her that her claims would not fall on deaf ears. Sara Reedy’s case<sup>239</sup> also has important symbolic meaning, as it signals to her and other potential complainants that police are not sympathetic to reports of sexual violence. This case sends the message that these claims are not only likely to fall on deaf ears, but that complainants may in fact be punished for reporting. Such practices have deep resonance and not only impact

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237. For just a few of the most pertinent examples, see Goodmark on the assumption that physical separation of individuals involved in an abusive relationship is always the best way to prevent further violence. LEIGH GOODMARK, *A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM* 81–83 (2012). Schneider discusses the emergence, problems with, and subsequent abandonment of battered woman syndrome. ELIZABETH SCHNEIDER, *BATTERED WOMEN & FEMINIST LAWMAKING* 112–47 (2000). Coker dissects the negative impact, especially for low-income communities and people of color, of ostensibly pro-victim policies such as mandatory arrest programs. Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 *BUFF. CRIM. L. REV.* 801, 806–07, 808–11 (2001).

238. Miller & Schwartz, *supra* note 3, at 13–14.

239. See generally *Reedy v. Evanson*, 615 F.3d 197 (3d Cir. 2010).

individual claimants, but also fundamentally shape democratic citizenship, political participation, and respect for the law.

Political and legal scholars have argued persuasively that people like Linda and Sara “learn” important lessons from interactions with government actors.<sup>240</sup> When people and their claims are treated with respect, when institutions are welcoming, and when processes are transparent and straightforward, people see themselves as citizens who have legitimate claims to assistance and state-conferred benefits.<sup>241</sup> When people and their claims are ignored or rejected for seemingly irrelevant reasons, when institutions are dirty, uncomfortable, or intimidating, and when processes are experienced as confusing, unfair, and arbitrary, people learn not only that they have no recourse in that system, but that government more broadly discounts them as worthy of resources or respect.<sup>242</sup> When these lessons are systematically taught to, and learned by, groups of people or communities, they have profound implications for people’s sense of fairness and justice and for their full participation in all aspects of society.<sup>243</sup> The processes made visible by the Arena suggest that criminal justice personnel’s interpretation and classification of women, particularly those who are marginalized, have broader ramifications for these groups within the criminal justice system and beyond.

This Article challenges both formalist and legal realist models of the criminal justice system. We show that while the criminal justice system is by no means an objective, value-free space in which actors simply assess evidence abstracted from context, it is also not a space that is inherently and inevitably infused with bias, discrimination, and injustice. In highlighting the fact that case trajectories result from choices and behaviors, we point to the potential for criminal justice systems to adopt different approaches to the investigation and prosecution of sexual crimes. We do not believe that such changes would be easy, nor do we underestimate the troubling roles of coercion and discrimination that *are*

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240. See Anne Schneider & Helen Ingram, *Social Construction of Target Populations: Implications for Politics and Policy*, 87 AM. POL. SCI. REV. 334, 338–39, 340–41 (1993).

241. See, e.g., ANDREA LOUISE CAMPBELL, HOW POLICIES MAKE CITIZENS: SENIOR POLITICAL ACTIVISM AND THE AMERICAN WELFARE STATE 6–7 (2003) (“[T]he manner in which government policies treat clients instills lessons about groups’ privileges and rights as citizens.”); SUZANNE METTLER, SOLDIERS TO CITIZENS: THE GI BILL AND THE MAKING OF THE GREATEST GENERATION 106, 110–11, 119–20 (2005); COREY SHDAIMAH, NEGOTIATING JUSTICE: PROGRESSIVE LAWYERING, LOW-INCOME CLIENTS, AND THE QUEST FOR SOCIAL CHANGE 137–38, 140–42 (2009).

242. See, e.g., JOE SOSS, UNWANTED CLAIMS: THE POLITICS OF PARTICIPATION IN THE U.S. WELFARE SYSTEM 90–91, 107–12 (2002); Austin Sarat, “*The Law is All Over*”: Power, Resistance, and the Legal Consciousness of the Welfare Poor, 2 YALE J.L. & HUMAN. 343, 346, 359, 378 (1990); Wesley G. Skogan, *Asymmetry in the Impact of Encounters with Police*, 16 POLICING & SOC’Y 99, 112–13 (2006); Vesla M. Weaver & Amy E. Lerman, *Political Consequences of the Carceral State*, 104 AM. POL. SCI. REV. 1, 3 (2010).

243. TOM R. TYLER, WHY PEOPLE OBEY THE LAW: PROCEDURAL JUSTICE, LEGITIMACY, AND COMPLIANCE 132–34 (1990); Suzanne Mettler & Joe Soss, *The Consequences of Public Policy for Democratic Citizenship: Bridging Policy Studies and Mass Politics*, 2 PERSP. POL. 55, 62 (2004).

inevitably present in criminal justice processes. But in showing that case outcomes are clearly driven in part by the decisions of criminal justice actors, we believe we can ask why some jurisdictions and individuals make choices and employ techniques that others do not. And in making those choices and their implications more readily visible, we believe that we uncover and can demand greater transparency and accountability from criminal justice officials, no longer permitting them to operate as “people with secrets.”

